STATE POWER AND THE PASSAMAQUODDY TRIBE: "A GROSS NATIONAL HYPOCRISY?"

There are approximately 1600 Indians presently living on reservations in Maine. This population is about evenly distributed between the Penobscot Tribe located near Old Town and the Passamaquoddy Tribe, which is located on two reservations in Washington County. Unlike the majority of Indian tribes in the United States, the Maine tribes have been subject to exclusive state, as opposed to federal, governmental power. In this article the authors question the premises upon which the power of Maine over the Indians within its borders is founded.

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I. INTRODUCTION

Because of their strategic location on the sparsely settled Canadian border,[1] the Passamaquoddy Indians were of great importance in the American Revolution, and played a decisive role in securing eastern Maine for the United States.[2] As soon as the hostilities had ended, however, the federal government promptly forgot about these Indian allies in what is now the State of Maine and, whether intentionally or not, left the Passamaquoddy Tribe in its dealings with the dominant society to the mercy of Massachusetts and, after 1820, Maine.[3]

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[1] *See* Colonel Allan's Report on the Indian Tribes in 1793, in F. KIDDER, MILITARY OPERATIONS IN EASTERN MAINE AND NOVA SCOTIA DURING THE REVOLUTION 305-18 (1867) [hereinafter cited as KIDDER].

[2] W. KILBY, EASTPORT AND PASSAMAQUODDY 485 (1888).

[3] Ch. 36, [1819] Mass. Laws 504. The United States Congress ratified the Act of Separation on March 3, 1820. Act of March 3, 1820, ch. 19, 3 Stat. 544.

Shortly after the formation of the Union, Massachusetts entered into a treaty with the Passamaquoddy Tribe,[4] pursuant to which it assumed the power to deal with the tribe exclusive of the federal government. By the Act of Separation of 1820, the new State of Maine undertook fulfill all existing treaty obligations of the State of Massachusetts owed to the Indian tribes within its borders.[5] With the assumption of these treaty obligations, Maine began to assume the power over the Passamaquoddy Tribe which Massachusetts had assumed before the Act of Separation. Subsequently, the Maine courts confirmed that power and, in the process, developed a body of state Indian law which differed radically from the body of Indian law that has emanated from the federal courts. The courts in Maine came to look upon Indians as mere recipients of charity, as enclaves of disenfranchised citizens bereft of any special status.[6] The federal courts,

[4] Treaty with the Passamaquoddy Tribe of Indians, by the Commonwealth of Massachusetts, September 29, 1794, in VIII MAINE HISTORICAL SOCIETY, DOCUMENTARY HISTORY OF THE STATE OF MAINE 98-102 (2d ser. 1902) [hereinafter cited as DOCUMENTARY HISTORY OF MAINE]. Massachusetts also entered into treaties with the Penobscot Tribe in Maine. Treaty with Penobscot Tribe of Indians, by the Commonwealth of Massachusetts, October 11, 1786, in VIII DOCUMENTARY HISTORY OF MAINE 80-82 (2d ser. 1902). Treaty with the Penobscot Tribe of Indians, by the Commonwealth of Massachusetts, June 29, 1818, in VIII DOCUMENTARY HISTORY OF MAINE 127-32 (2d ser. 1902). These three treaties were ordered reprinted with the Resolves of Maine for 1843. [1843] Me. Resolves 253-66. Although the Penobscot Tribe occupies a position similar to that of the Passamaquoddy, for reasons of convenience it will not be discussed in this article, without implying thereby that the analysis put forth is not applicable to them.

[5] ME. CONST. art. X, § 5, in [1821] Me. Laws 45-50. Although this compact of separation remains a part of the Maine Constitution, it is no longer printed. Ch. 98, [1875] Me. Resolves 35.

[6] In Murch v. Tomer, 21 Me. 535, 538 (1842), the highest court of Maine stated that "imbecility on their [the Indians] part, and the dictates of humanity on ours, have necessarily prescribed to them their subjection to our paternal control; in disregard of some, at least, of abstract principles of the rights of man." Such was the nature of any special status that the court saw for the Penobscots. The court denied any status based on separate nationhood and found that, but for our charitable inclinations, Indians were just like any other individuals "born and reared upon our own soil." *Id.* at 537. Subsequently, the court in Penobscot Tribe of Indians v. Veazie, 58 Me. 402 (1870), denied that any rights were conferred by original Indian title on the grounds that "a door would be opened to endless litigation, and thousands of titles, now considered perfectly secure, would be instantly destroyed." *Id.* at 406-07. The court seemed to recognize that numerous land deals had occurred in Maine without regard to original Indian title but did not supply a basis for disregarding rights stemming from such title. The concept of original Indian title is briefly discussed at pp. 14, 26 & note 80 *infra*. For a thorough discussion of original Indian title *see* Cohen, *Original Indian Title*, 32 MINN. L. REV. 28 (1947). The manner in which the highest court of Maine treated the Passamaquoddy Tribe in Granger v. Avery, 64 Me. 292 (1874), and State v. Newell, 84 Me. 465, 24 A. 943 (1892), is discussed at pp. 13-17 *infra*. *See* Stevens v. Thatcher, 91 Me. 70, 39 A. 282 (1897); John v. Sabattis, 69 Me. 473 (1879).

on the other hand, considered Indian tribes to be semi-sovereign nations and created a body of case law based, for the most part, on respect for Indian treaties, protection of Indian property rights, and the inapplicability of state laws which interfered with tribal self-government.[7] Furthermore, where the United States Congress enacted legislation protecting Indian property,[8] the Maine Legislature assumed the power to

[7] *See* United States v. Sante Fe Pacific R.R., Co., 314 U.S. 339 (1941); Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831); COMMISSION ON THE RIGHTS, LIBERTIES, AND RESPONSIBILITIES OF THE AMERICAN INDIAN, THE INDIAN: AMERICA'S UNFINISHED BUSINESS 183 (W. Brophy & S. Aberle eds. 1966) [hereinafter cited as AMERICA'S UNFINISHED BUSINESS]; Cohen, *Indian Rights and the Federal Courts*, 24 MINN. L. REV. 145 (1940); Oliver, *The Legal Status of American Indian Tribes*, 38 ORE. L. REV. 193 (1959). For a background discussion of *Cherokee Nation* and *Worcester* see Burke, *The Cherokee Cases: A Study in Law, Politics, and Morality*, 21 STAN. L. REV. 500 (1969).

[8] Act of July 22, 1790, ch. 33, § 4, 1 Stat. 138:

> *And be it enacted and declared*, That no sale of lands made by any Indians, or any nation or tribe of Indians within the United States, shall be valid to any person or persons, or to any state, whether having the right of pre-emption to such lands or not, unless the same shall be made and duly executed at some public treaty, held under the authority of the United States.

This enactment, the First Non-Intercourse Act, was revised by the Act of March 1, 1793, ch. 19, § 8, 1 Stat. 330-31. The revised enactment, the Second Non-Intercourse Act, made it an act subject to criminal penalty to negotiate with Indians for sale of their lands:

> *And be it further enacted*, That no purchase or grant of lands, or of any title or claim thereto, from any Indians or nation or tribe of Indians, within the bounds of the United States, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the constitution; and it shall be a misdemeanor, in any person not employed under the authority of the United States, in negotiating such treaty or convention, punishable by fine not exceeding one thousand dollars, and imprisonment not exceeding twelve months, directly or indirectly to treat with any such Indians, nation or tribe of Indians, for the title or purchase of any lands by them held, or claimed: *Provided nevertheless*, That it shall be lawful for the agent or agents of any state, who may be present at any treaty, held with Indians under the authority of the United States, in the presence, and with the approbation of the commissioner or commissioners of the United States, appointed to hold the same, to propose to, and adjust with the Indians, the compensation to be made for their claims to lands within such state, which shall be extinguished by the treaty.

Such federal restrictions on dealing with the Indians were continued in later legislation and comprise part of federal Indian law today. Act of June 30, 1834, ch. 161, § 12, 4 Stat. 730, *codified at* 25 U.S.C. § 177 (1964).

It might be argued that since the prohibition against states dealing with the In-

deal with the property of the two tribes according to its whim, authorizing sales and leases of tribal lands without the consent of the tribes.[9]

The United States Constitution specifically vests paramount power over Indian tribes in the federal government.[10] The Supreme Court of the United States has also repeatedly recognized an overriding federal power of guardianship over Indian tribes, without relying on any specific constitutional grants of authority.[11] The sources from which Massachusetts derived its power to conclude treaties with the Passamaquoddy Tribe are obscure. Even if these treaties are not denominated treaties in the constitutional sense and did not, therefore, require consummation and ratification in accordance with the prescriptions of the Constitution,[12] they do represent an assumption of state power, later assumed by

dians was dropped from the legislation in the Second Non-Intercourse Act that the federal government no longer intended to bar states from so dealing. Such a construction would support a claim on behalf of Massachusetts or Maine that Massachusetts was not prevented, at least by this enactment, from making the treaty of 1794 with the Passamaquoddy Tribe. However, the purpose of the changes in the Second Non-Intercourse Act was to make purchases void and subject to criminal penalty. The First Non-Intercourse Act had merely made sales void without any criminal penalty. Since a state could not be subject to a criminal penalty the reference to states had to be dropped from the context of the Second Non-Intercourse Act. The terms of the second enactment are, however, addressed to all purchases, and contemplate that an agent of the state could be liable for the criminal penalty for negotiating to any greater extent than that allowed by the Act. If the states were not still barred from dealing with the Indians there would be no need for such a provision since a state acts through its agents and could itself authorize an agent to deal with the Indians on the state's own terms. The Second Non-Intercourse Act obviously did not permit such state authorization. *See* discussion in note 12 *infra*.

[9] Between 1821 and 1839 the Maine Legislature authorized the cutting of all sizes and types of timber from Passamaquoddy lands in violation of the 1794 treaty. Ch. 3, [1824] Me. Resolves 308; ch. 9, [1821] Me. Resolves 56. On numerous other occasions Indian lands were alienated by the Maine Legislature without any provision for consent or compensation for the property. Ch. 49, [1833] Me. Resolves 527; ch. 69, [1832] Me. Laws 408; ch. 4, [1831] Me. Resolves 164; ch. 68, [1828] Me. Resolves 808; ch. 17, [1826] Me. Resolves 489.

[10] U.S. CONST. art. I, § 8; U.S. CONST. art. II, § 2. By virtue of these provisions the President is given the power, with the advice and consent of the Senate, to make treaties, and Congress is given the power to regulate commerce with the Indian tribes. For a discussion of these and other specific provisions of the Constitution which support the federal paramount power, see DEP'T OF INTERIOR, FEDERAL INDIAN LAW 21-93 (rev. ed. 1966) [hereinafter cited as FEDERAL INDIAN LAW]; Rice, *The Position of the American Indian in the Law of the United States*, 16 J. COMP. LEG. & INT'L L. 78-95 (1934).

[11] United States v. Nice, 241 U.S. 591, 597-98 (1916); Tiger v. Western Investment Co., 221 U.S. 286, 315 (1911); United States v. Kagama, 118 U.S. 375, 383-85 (1886). See Chief Justice Marshall's opinions in the *Cherokee* cases for the seeds of the guardianship relations. 30 U.S. (5 Pet.) 1 (1831).

[12] In Seneca Nation v. Christie, 126 N.Y. 122, 27 N.E. 275 (1891), *writ of*

Maine, to deal freely with the tribe in apparent contravention of the federal government's paramount power over Indian tribes.

The Passamaquoddy Tribe is a relatively small one, but there are approximately 120,000 other tribal Indians, mostly residing in the Eastern United States, who also have been ignored by the federal government.[13]

error dismissed, 162 U.S. 283 (1896), New York's highest court considered the validity of an 1826 grant of lands to the Ogden Land Company by the Seneca Indians. The Senecas claimed that from the time the U.S. Constitution was adopted no valid purchase of Indian lands could be made except under, and pursuant to, a treaty between the United States and the tribe in occupation of the lands, executed by the President and the Senate in accordance with the Constitution. The court found that the 1826 grant was not a treaty in the constitutional sense mainly based on the theory that so many illustrious men as had dealt freely with the Indians of New York in the early years of the Union, would not have done so if they considered these dealings to amount to treaties in the constitutional sense. The court determined that the 1826 grant complied with the Non-Intercourse Acts because of the presence of United States commissioners when the 1826 grant was made. Because the suit was brought under a state ejectment statute with a statute of limitations long-tolled, the Supreme Court of the United States dismissed the appeal based on the right asserted being limited by the statute under which the tribe sued.

Christie is an important case in that it resurrected the idea that states which were original colonies had special powers to deal with the Indian tribes within their borders. For a discussion of this aspect of the case see p. 28 *infra*. The *Christie* decision also displays much strained reasoning. Once having dispensed with the idea that the 1826 grant was not a treaty in the constitutional sense, the court found that the grant complied with the Non-Intercourse Act. However, the Non-Intercourse Act specifically voided any purchase or grant from any Indians "unless the same be made by a treaty or convention entered into *pursuant to the constitution*." Act of March 1, 1793, ch. 19, § 8, 1 Stat. 330. (emphasis added) The Act also permitted agents of the state to be present at treaty negotiations for extinguishment of title to Indian lands. But the *Christie* court read this permission as a separate grant of power to the states who enjoyed the right of preemption to Indian lands to deal directly with the tribes by means other than a treaty in the constitutional sense, once federal commissioners were present. For full text and discussion of the enactment see note 8 *supra*. Furthermore, treaties in the constitutional sense were the usual way of dealing with Indian tribes by the United States until 1871. *See, e.g.*, Treaty with the New York Indians, Jan. 15, 1838, 7 Stat. 550. In 1871, Congress decreed that henceforth statutes would be the exclusive mode of dealing with Indian tribes. Act of March 3, 1871, ch. 120, § 1, 16 Stat. 556, *codified at* 25 U.S.C. § 71 (1964).

If the State of Maine should claim that Massachusetts did not engage in a treaty with the Passamaquoddy in the constitutional sense, and if this claim should find judicial support, Maine will still have to show the basis for avoidance of requirements of the Non-Intercourse Act which are essentially that a state could not deal with Indian lands unless pursuant to a treaty in the constitutional sense, at least before 1871. For a discussion of the applicability of the Non-Intercourse Act to Indian lands in which the United States has no ownership interest see United States v. Candelaria, 271 U.S. 432 (1926).

[13] Telephone Interview with Representative of The Bureau of Indian Affairs, Washington, D.C., December 16, 1970.

As a result, these Indians are denied services which the federal government provides for Indians, and are prevented from invoking the protections provided by federal Indian law. In analyzing the validity of the dichotomy between federal and state Indians, this article examines the effects, and questions the possible sources, of Maine's power to deal with the Passamaquoddy Tribe exclusive of the federal government.

II. The Passamaquoddy Tribe and Passamaquoddy-State Relations: A Brief History

A. Pre-1794 Treaty.

During the eighteenth century the region to the east of the Ohio River was inhabited by two large Indian confederacies: The Iroquois, or the Six Nations, who roamed from the Ohio River to New York State; and the Great Council Fire, sometimes called the Seven Nations, who occupied what is now Quebec, New Brunswick, Nova Scotia, and Maine.[14] The Passamaquoddy Tribe was part of the eastern half of the Seven Nations, which also included the Penobscot, Micmac, and Maliseet Tribes, and was known as the Wabanaki Confederacy.[15]

Prior to 1794, the Passamaquoddy Indians occupied and had as their traditional hunting grounds virtually all of the land in the State of Maine between the Naraguagus and Saint Croix Rivers, in addition to other lands across the Canadian border.[16] In this large area members of the tribe roamed freely and depended upon hunting, trapping, and fishing for their livelihood.[17] The tribe also grew corn and tobacco[18] and, to secure necessities of life, traded valuable furs and skins with white traders.[19] The Passamaquoddies held their lands in common and apportioned the use of parcels of land to families or groups of families on the basis of need.[20] These divisions of land were scrupulously respected.[21] The tribe followed an informal pattern of democracy with the tribal council settling internal public matters, and with the authority of chiefs depending upon their leadership abilities.[22] A French traveller, Lescarbot, was very much impressed with the humanity of the Passamaquoddies and described

[14] F. Hough, A History of St. Lawrence and Franklin Counties 127 (1853); Speck, *Eastern Algonkian Confederacy*, 17 American Anthropologist 3 (1915).

[15] 11 Annals N.Y. Acad. Sci. 369-77 (1898).

[16] H. Davis, An International Community on the St. Croix, 1604-1930, at 3-4 (52-12 The Maine Bulletin, 1950) [hereinafter cited as Davis].

[17] *Id.* at 4.

[18] *Id.*

[19] *Id.* at 6.

[20] *Id.* at 4.

[21] *Id.*

[22] *Id.*

them as "more honorable than many of those who bear the name of Christians." [23]

During the first half of the eighteenth century, the British made a series of treaties with various tribes in the Wabanaki Confederacy.[24] These treaties did not cede any land, but provided for mutual peace and friendship in addition to protection of Indian hunting and fishing rights. In contrast to the history of the tribes in the Wabanaki Confederacy, some tribes in southern Massachusetts at an early date either sold or ceded their land, adopted European dress and habits, and were settled on small tracts by the British. The treatment of the Iroquois also differed markedly from that of the Indians in the Wabanaki Confederacy. After the conclusion of the French and Indian War, the Crown in 1768 concluded a treaty with the Iroquois Confederacy wherein a permanent boundary was recognized between the Iroquois "Indian territory" and the land belonging to the white settlers.[25]

Being less concerned about the tribes of the Wabanaki Confederacy because they were not of strategic importance until the American Revolution,[26] the British followed a mixed policy with regard to these Indians. The Crown attempted, largely without success, to restrict the Micmac and Maliseet to reservations, to intimidate the Penobscot, and dealt with the Passamaquoddy Tribe only when necessary.[27] The Passamaquoddy Tribe never made any concessions to the British,[28] and at one point the

[23] 2 M. Lescarbot, History of France 359 (1911).

[24] The Conference of His Excellency the governour, with the Sachems & Chief men of the Eastern Indians, Aug. 10-12, 1717, George Town on Arrowsick Island, in III Maine Historical Society, Collections of the Maine Historical Society 361 (1st ser. 1853) [hereinafter cited as Maine Collections]. The Conference with the Eastern Indians at the Ratification of the Peace, Aug. 11, 1726, Falmouth in Casco Bay, in III Maine Collections 407 (1st ser. 1853). Treaty with the Eastern Indians, Oct. 16, 1749, Falmouth in Casco Bay, in IV Maine Collections 145 (1st ser. 1856). Treaty with the Eastern Indians Oct. 21, 1752, St. George's Fort, in IV Maine Collections 168 (1st ser. 1856).

[25] In 1768, acting under a Commission of the British Crown, Sir William Johnson entered into a treaty with the Six Nations by the terms of which the boundaries of the Iroquois Confederacy were defined and located, and the territory of these Nations definitely set apart from the lands of the Colony of New York. By this treaty the Indians sold and granted to the King "all that Tract of Land situated in North America at the Back of the British Settlements bounded by a line which we have now agreed upon and do hereby establish as the Boundary between us and the British colonies in America." Federal Indian Law, *supra* note 10, at 968 n.4.

[26] *See* note 1 *supra*.

[27] XIV Documentary History of Maine, *supra* note 4, at 54-55, 61-62 (2d ser. 1910). For a brief discussion of the unique treatment of the Micmacs, *see* G. Buesing, Notes on Wabanaki History to 1800, at 49, June, 1970 (unpublished thesis in Wesleyan University Library) [hereinafter cited as Buesing].

[28] XXIV Documentary History of Maine, *supra* note 4, at 114-15 (2d ser. 1916); Buesing, *supra* note 27, at 50.

tribe received a promise from the colonial Governor of Massachusetts that no white settlers had been or would be permitted to occupy the Passamaquoddy hunting grounds in the District of Maine.[29]

Many changes took place in Passamaquoddy foreign relations with the onset of the American Revolution. The tribes in the Wabanaki Confederacy had been generally unhappy with British attempts to restrict the land usage of the Micmac and Maliseet tribes, sympathized with what they perceived as exploitation of the colonists by the King, and were quick to accept the colonists' offers of alliance.[30] Many other tribes supported the British because of the Crown's encouragement of the fur trade.[31] Late in 1777, the members of the Wabanaki Confederacy who occupied territory outside the District of Maine, the Passamaquoddy, Maliseet, and Micmac Tribes, signed a treaty with the colonists in which they agreed to inclusion of their lands within the United States.[32]

During the Revolution all four of the tribes in the Wabanaki Confederacy fought against the Crown. These tribes made a sweep of the Penobscot Valley,[33] and when Sir George Collier attacked Machias in 1777, the Passamaquoddy Tribe made up part of the force which repulsed the British.[34] The Wabanaki Confederacy was generally responsible for routing the British from eastern Maine.[35]

The 1777 treaty had been negotiated by Colonel John Allan, the federal government's commander of the Eastern Indian Outpost. Allan had developed a close relationship with the Passamaquoddy Tribe,[36] and referring to his meeting with tribal members during the treaty negotiations, reported that the tribe accepted him as agent of the federal government and agreed to defend lands within federal jurisdiction.[37] Allan in return promised "that they [the Passamaquoddy Tribe] should be for-

[29] *See* note 28 *supra*.

[30] For alliances made by the Penobscots in 1775, see XIV DOCUMENTARY HISTORY OF MAINE, *supra* note 4, at 270 (2d ser. 1910); KIDDER, *supra* note 1, at 31-32; for alliances made by the Maliseets in 1775-1776, see XXIV DOCUMENTARY HISTORY OF MAINE 188-93 (2d ser. 1916); DAVIS *supra* note 16, at 11. *See also* KIDDER, *supra* note 1, at 105-06, 121, 234-35, 311-12.

[31] DAVIS, *supra* note 16, at 11.

[32] KIDDER, *supra* note 1, at 105-06, 121, 234-35, 311-12.

[33] *Id.* at 203-12, 225-27, 232-33. Colonel John Allan, in a letter of September 28, 1779, to John Jay, President of the Continental Congress, indicated the colonists had "only Indians to depend upon to defend the country." He indicated that the British expected to loose the war but gain control of Maine to the Kennebec, and had, therefore, invaded and secured the Penobscot River Valley. 78 PAPERS OF THE CONTINENTAL CONGRESS 317-18 (on file in the National Archives).

[34] W. KILBY, EASTPORT AND PASSAMAQUODDY 485 (1888).

[35] *See* KIDDER, *supra* note 1, at 297-98.

[36] W. KERR, THE MARITIME PROVINCES OF BRITISH NORTH AMERICA AND THE AMERICAN REVOLUTION 87-104 (1943).

[37] KIDDER, *supra* note 1, at 311.

ever viewed as brothers and children under the Protection and Fatherly care of the United States and enjoy every right and privilege. . . ." [38] In 1784, Allan transmitted a letter to the tribe from George Washington which thanked the Indians for their service to the federal government.[39] The agent also noted in a letter to the Passamaquoddy Tribe that he had transmitted the tribe's message to Congress about certain claims of the tribe and that the Congress had promised to see that justice would be done.[40]

The Eastern Outpost was replaced in 1783 by the Eastern Division of the peacetime federal Department of Indian Affairs.[41] This office was to ratify the treaties that had been made with the Indians before and during the Revolution, but was closed after nine months of operation.[42] Massachusetts complained that it alone had the privilege of treating with the Indians within its borders,[43] and the federal government, which at that time was more concerned about hostile Iroquois, did not attempt, it appears, to deny Massachusetts its asserted power.[44] Thus, Massachusetts concluded the 1794 treaty with the Passamaquoddy Tribe.[45]

B. Post-1794 Treaty.

By the terms of the 1794 treaty the Passamaquoddy Tribe relinquished all but a small part of its former holdings. The tribe specifically reserved fifteen islands in the St. Croix river; two islands in Big Lake, near Princeton; a large township known as Indian Township; and a 10-acre tract at Pleasant Point, near Eastport.[46] These reserved lands included approximately 23,370 acres.[47] In addition, the tribe reserved the privilege of fishing on both branches of the St. Croix without hindrance or molestation,[48] and agreed to be "peaceable and quiet" and not to molest settlers of the Commonwealth.[49]

[38] *Id.*

[39] *Id.* at 298.

[40] *Id.* at 297.

[41] Colonel Allan's Report on the Indian Tribes in 1793, in KIDDER, *supra* note 1, at 313-14.

[42] *Id.* at 314.

[43] *Id.*

[44] For a discussion of federal conflicts with the Iroquois see FEDERAL INDIAN LAW, *supra* note 10, at 970-72. There is no evidence of any congressional consideration of the significance of the closing of the Eastern Division.

[45] Treaty of 1794, in VIII DOCUMENTARY HISTORY OF MAINE, note 4 *supra*, at 98-102 (2d ser. 1902).

[46] *Id.* at 99-100.

[47] Indian Township contained approximately 23,000 acres, Nimcas Point approximately 100 acres, and Pine Island approximately 150 acres. *Id.*

[48] *Id.* at 100.

[49] *Id.* at 99.

Prior to the 1794 treaty, the Commonwealth in 1793 had deeded away a parcel of land to William Bingham.[50] Included in the parcel were some of the lands reserved to the Passamaquoddy Tribe by the treaty.[51] No mention was made in the deed of any Indian rights in the land.[52]

Pursuant to the 1820 Act of Separation, Maine became a state and assumed all obligations owed to the Indians within its boundaries.[53] Maine was to obtain the consent of the Passamaquoddy Tribe to the substitution of Maine as the tribe's obligor.[54] Although this consent was never secured,[55] Maine nonetheless accepted compensation from the Commonwealth of Massachusetts for undertaking to fulfill all of the latter state's Indian obligations.[56]

The federal government ratified the Act of Separation on March 3, 1820.[57] Thereafter, Maine assumed complete power to deal with the Passamaquoddy Tribe and lands of the tribe. In the exercise of this assumed power, the Maine Legislature authorized the making of 999 year leases,[58] the sale of timber and grass (hay) from reservation lands;[59] the inundation of one of the islands reserved in the treaty;[60] and granted

[50] Deed of Eastern Lands to William Bingham, by the Commonwealth of Massachusetts, January 28, 1793, in VIII DOCUMENTARY HISTORY OF MAINE, *supra* note 4, at 94-98 (2d ser. 1902).

[51] *Id.*

[52] *Id.*

[53] *See* note 5 *supra.*

[54] *See* Proctor, Report to the Maine Legislative Research Committee on the Maine Indians 3 (1942) [hereinafter cited as Proctor Report].

[55] *Id.* at 21a.

[56] An entry on the cash book for the State of Maine, Treasury Office, Portland, Oct. 2, 1823, indicates payment of $30,000 to the State by the Commonwealth of Massachusetts:

> [I]n lieu of lands set off to the lands set off to the said State of Maine by the Commissioners under the act of Separation as an indemnity to the said State, for the duties and obligations assumed by the same towards the Indians therein.

See Address of Governor Albion K. Parris before Both Branches of the Legislature, January 10, 1824, [1824] Me. Resolves 305, indicating that Maine has assumed to perform certain obligations of Massachusetts in return for the payment of $30,000; ch. 16 [1823] Mass. Laws 655-56 where the Massachusetts Legislature authorized payment of the $30,000 to the State of Maine.

[57] Act of March 3, 1820, ch. 19, 3 Stat. 544.

[58] 58 Ch. 116, [1879] Me. Resolves 97.

[59] Ch. 241, [1868] Me. Resolves 191; ch. 51, [1853] Me. Resolves 28; *as amended* ch. 48, [1861] Me. Resolves 24; ch. 3, [1824] Me. Resolves 308; ch. 9, [1821] Me. Resolves 56. *See also* 22 ME. REV. STAT. ANN. tit. 22, §4834 (Supp. 1970).

[60] Ch. 97, [1841] Me. Laws 292.

road, rail, and utility rights-of-way through the Passamaquoddy Reservations.[61] In none of these instances was the consent of the tribe obtained.[62] Compensation was paid only for the taking of timber.[63]

The Maine Legislature also has assumed complete discretionary authority to grant to the Passamaquoddy Tribe whatever elements of autonomy and self-government it has felt appropriate at any given time, without reference to federal protection of tribal sovereignty.[64] The statutes

[61] Ch. 54, [1836] Me. Resolves 47; ch. 3, [1835] Me. Resolves 707; ch. 15, [1833] Me. Resolves 508 (roads); ch. 69, [1832] Me. Resolves 408 (lots along road); ch. 84, [1899] Me. Priv. & Spec. Laws 112; ch. 123, [1879] Me. Resolves 99; ch. 116, [1879] Me. Resolves 97; ch. 234, [1871] Me. Resolves 191; ch. 246, [1863] Me. Resolves 255; ch. 48, [1861] Me. Resolves 24; ch. 336, [1860] Me. Resolves 337; ch. 97, [1841] Me. Laws 292; ch. 9, [1837] Me. Resolves 151; ch. 54, [1836] Me. Resolves 47 (alienation of lands without consent).

[62] On rare occasions compensation was paid. Ch. 69, [1832] Me. Resolves 408.

[63] Ch. 275, [1941] Me. Laws 352; ch. 144, [1919] Me. Laws 146; ch. 241, [1868] Me. Resolves 191; ch. 48, [1861] Me. Resolves 24; ch. 51, [1853] Me. Resolves 28 (sale of timber from Indian land).

In 1856, $22,500 was deposited in the Maine Treasury. This money was to constitute an Indian trust fund, and interest was to be paid at the rate of six per cent. A second deposit of $5,225 was made in 1857, and after that time the annual proceeds of sales of timber from the Indian township reservation were deposited in the fund. Proctor Report, *supra* note 54, at 32-40. The proceeds of these sales were deposited in the fund, but no interest was paid between 1859 and 1969. Telephone Interview with Edward C. Hinckley, former Maine Commissioner of Indian Affairs, December 15, 1970, Bar Harbor, Maine. The corpus of the fund has also been seriously mismanaged. During the 1920's, $10,000 was invested in worthless bonds issued by the City of Eastport. During the 1950's, $180,000, nearly the entire trust, was spent pursuant to executive order for new housing for the reservations. The fund was charged $8,000 for each new house, but immediate deterioration and subsequent assessment indicate that the actual value was no more than $2,500. Interview with Charles E. Hicks, Resident Engineer for the Pleasant Point Passamaquoddy Housing Authority, November 2, 1970, Calais, Maine. A Passamaquoddy mother of nine recently burned to death in one of these houses. Although no inquest was held, the fire and death were undoubtedly due in part to the building's cheap construction, specifically the use of plywood for walls, the use of oil stoves for heat, and the failure to include a back door. Bangor Daily News, May 16, 1970, at 1, col. 6.

[64] For a discussion of tribal sovereignty as that doctrine was developed by the federal courts in relation to federal tribes, and limited or extended by Congress, see FEDERAL INDIAN LAW, *supra* note 10, at 395-454. Federal policy has never conferred on so-called federal tribes unlimited sovereignty. Rather, federal policy has vacillated between attempts to assimilate the Indians into the mainstream of American life and protection of Indian sovereignty. Many federal policies were based on notions which in retrospect were totally misfounded. A virgin relationship with the federal government on the part of a tribe such as the Passamaquoddy Tribe could avoid mistakes of the past and the lessons learned therefrom.

In the colonial period the Indian tribes were usually seen, and dealt with, as independent nations in all senses of the word. This, of course, was due to practicalities of life. Indian tribes were often more powerful than the white invaders and it was not possible to treat an Indian tribe as dependent until might supported

the right to compel dependence. For a discussion of Indian-White relations in the early years see McNickle, *Indian and European: Indian-White Relations from Discovery to 1887*, 311 ANNALS 1 (1957).

The General Allotment Act of 1887 was the first major enactment of the federal government that had forced assimilation of Indian tribes as its purpose. Act of Feb. 8, 1887, ch. 119, 24 Stat. 388, *codified at* 25 U.S.C. §§ 331-34, 336, 339, 341-42, 348-49, 381 (1964). Allotments of Indian lands to Indian individuals were authorized by this Act in an attempt to acculturate the Indian to the ways of the dominant society by putting an end to communal land use and ownership. Those who received allotments became citizens of the United States. The idea behind the Act was that Indians needed to be civilized and that the basis of civilization lay in the ability to handle individual property. The complexities of the allotment program, as it developed, complicated chiefly by white efforts to acquire Indian land as soon as Indians were given individual titles, resulted in its subsequent abandonment. Assimilation was not accomplished, but Indian lands dwindled and became fragmented. *See* AMERICA'S UNFINISHED BUSINESS, note 7 *supra*, at 179-93; E. SPICER, CYCLES OF CONQUEST, THE IMPACT OF SPAIN, MEXICO AND THE UNITED STATES ON THE INDIANS OF THE SOUTHWEST, 1533-1960, at 347-57 (1962); Haas, *The Legal Aspects of Indian Affairs from 1887 to 1957*, 311 ANNALS 12 (1957).

A sharp shift of federal policy came in 1934 with the passage of the Indian Reorganization Act. Act of June 18, 1934, ch. 576, 48 Stat. 984, *codified at* 25 U.S.C. §461 *et seq.* (1964). One of the purposes of the Act was to "stabilize the tribal organizations . . . with real, though limited, authority, and [to set down] conditions which must be met by such tribal organizations." S. REP. NO. 1080, 73d Cong., 2d Sess. 1 (1934). The first section of the Act enabled numerous lands to be restored to tribal ownership. 25 U.S.C. § 461 (1964). The legislation also encouraged the tribes to stabilize their forms of government and organization by providing for approval of tribal constitutions by the Secretary of the Interior. 25 U.S.C. § 477 (1964).

In the 1950's there was a new swing in federal policy towards allowing the states to assume civil and criminal jurisdiction over tribes within their borders. Public Law 280 was enacted, which had this effect. Act of Aug. 15, 1953, ch. 505, 67 Stat. 588, *codified at* 18 U.S.C. § 1162, 28 U.S.C. § 1360 (1964). The congressional intent behind the Act was to terminate federal responsibility for Indian affairs wherever possible. H.R. REP. No. 848, 83d Cong., 1st Sess. 3-8 (1953). Public Law 280 was later repealed.

Subsequently, specific enactments were passed terminating all federal services to certain tribes. *See, e.g.*, Act of July 17, 1954, ch. 303, 68 Stat. 250, *codified at* 25 U.S.C. §§ 891-902 (1964), which terminated federal services for the Menominee Tribe of Wisconsin. The experience for the Menominees of dislocation, disorientation, economic deterioration, and loss of land was reportedly a very unhappy one. For a discussion of the Menominee situation after termination, see E. Fidell, Taxes, Development and American Indian Background, Policy and Alternatives, June 1, 1968 (unpublished thesis in Harvard Law School Library). For scholarly dedication to supplying motives for termination, see Davies, *State Taxation on Indian Reservations*, 1966 UTAH L. REV. 132.

The assimilative policy of the termination acts has now once again been reversed. On July 8, 1970, President Nixon in a many-pointed plan promised full support for Indian self-determination. *Indian Affairs, the President's Message to the Congress*, 6 WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS 894 (1970). As early as 1968, in fact, a final note may have been struck in the federal policy vacillation

of Maine define an Indian for the purposes of tribal membership;[65] provide that contracts by the tribe must be approved by the State Commissioner of Indian Affairs;[66] provide for the Governor of the State to make decisions as to the expenditure of tribal funds;[67] and provide the regulations under which the tribe shall hold elections and choose its governors and council.[68] Prior to 1980 MICSA

Maine law also currently provides for free hunting, fishing, and trapping licenses for all members of the Passamaquoddy Tribe over the age of 10.[69] The licenses, however, are specifically made subject to all of the laws, rules, and regulations promulgated by the Maine Fish and Game Commission.[70] The tribal governor and council are permitted to make regulations controlling hunting, fishing, and trapping by Indians on the reservation, but these regulations must be consented to by the Inland Fish and Game Commissioner.[71]

Only two significant Maine court decisions have dealt with the status and rights of the Passamaquoddy Tribe.[72] These decisions reflect the same perspective of the tribe as that reflected in various actions of the Maine Legislature, a perspective involving no special status, no special rights, and absolute state governmental power.

In 1874, a non-Indian named Granger sued the state agent of the Passamaquoddy Tribe for trespass on certain lands and for cutting grass on the lands. The Indian agent justified his presence on the lands, and the taking of grass, on the basis that the Passamaquoddy Tribe owned the lands in question under original Indian title, which he asserted had never

between assimilation and protection of Indian self-determination. In that year, Congress, after six years of hearings, finally passed an Indian Bill of Rights making tribal governments subject to restrictions similar to those contained in the United States Bill of Rights, thereby implying a policy whereby Indian tribes might best be promoted as permanent self-governing entities, in a framework of adaptation in place of assimilation. Act of April 11, 1968, Pub. L. No. 90-284, 82 Stat. 77, *codified at* 25 U.S.C. §§ 1301-41 (Supp. V, 1970). The Act also changed the effect of Public Law 280 in that henceforth tribes would have to consent to assumption of state jurisdiction. 25 U.S.C. §§ 1321-22 (Supp. V, 1970). For a discussion of the Indian Bill of Rights, see Note, *The Indian Bill of Rights and the Constitutional Status of Tribal Governments*, 82 HARV. L. REV. 1343 (1969).

[65] ME. REV. STAT. ANN. tit. 22, § 4701 (1964).

[66] ME. REV. STAT. ANN. tit. 22, § 4707 (1964).

[67] ME. REV. STAT. ANN. tit. 22, § 4714 (1964).

[68] ME. REV. STAT. ANN. tit. 22, § 4831 (Supp. 1970).

[69] ME. REV. STAT. ANN. tit. 12, § 2301 (Supp. 1970).

[70] *Id.*

[71] *Id.*

[72] State v. Newell, 84 Me. 465, 24 A. 943 (1892); Granger v. Avery, 64 Me. 292 (1874).

been relinquished.[73] The agent also asserted confirmation of Indian rights in the lands by virtue of the 1794 treaty.[74]

The highest court of Maine found in *Granger v. Avery* that prior to the 1794 treaty Massachusetts had already conveyed by deed, dated January 28, 1793, the lands in question to one William Bingham,[75] and could not reconvey these lands to the tribe in 1794. Since Granger claimed under the Bingham chain of title, the court confirmed the plaintiff's title to the lands.[76] The court also rejected the claim as to rights emanating from original Indian title, relying on a prior Maine case[77] for the proposition that the title of the government was superior to that of the aborigines and that, therefore, the Passamaquoddy Tribe had no "title originally" [78] to the lands in controversy. Whether the court was aware of the sanctity which the concept of "original Indian title" had assumed in the federal courts is unknown.[79] The earlier Maine case upon which *Granger* relied had construed the concept as a fanciful historical notion rather than a grant or recognition of rights.[80]

[73] 64 Me. at 292. For a discussion of original Indian title, see Cohen, *Original Indian Title*, 32 MINN. L. REV. 28 (1947), and discussion at pp. 14, 26 *infra*.

[74] 64 Me. at 292.

[75] *See* note 50 and accompanying text *supra*.

[76] 64 Me. at 296.

[77] Penobscot Tribe of Indians v. Veazie, 58 Me. 402 (1870).

[78] The use of language "title originally" in the context which used and the one-sentence summary dismissal of the original Indian title claim might support the conclusion that the court did not feel it was dealing with a legal term of art but a claim akin to "prior in time, prior in right." 64 Me. at 296.

[79] United States v. Santa Fe Pacific R.R., Co., 314 U.S. 339 (1941) (not even the federal government has wide latitude in dealing with Indian title); Leavenworth, L. & G. R.R. v. United States, 92 U.S. 733 (1875) (Indians have the unquestionable right to the land they occupy until the government extinguishes that right by a voluntary cession); Holden v. Joy, 84 U.S. (17 Wall.) 211 (1872) (Indian title to lands acquired by immemorial possession was absolute, subject only to the preemptive right of purchase acquired by the United States as successors of Great Britain); Mitchel v. United States, 34 U.S. (9 Pet.) 711, 746 (1835) (Indian right of occupancy is as sacred to the Indians as fee simple is to the whites).

[80] The court in Penobscot Tribe of Indians v. Veazie, 58 Me. 402 (1870), made no attempt to analyze the concept beyond the finding that title of the government was superior to the aborigines' title. The court might better have examined the landmark case considered by the United States Supreme Court in Johnson & Graham's Lessee v. McIntosh, 21 U.S. (8 Wheat.) 543 (1823), where it was stated that title of the government was superior to that of the aborigines. The Court was considering the validity of a grant made by an Indian tribe to certain individuals insofar as that grant affected the alleged power of the government to deal exclusively with the Indian tribes. Chief Justice Marshall articulated the idea that the title of the government was superior to that of the aborigines as a basis for establishing the principle that individuals could not receive title directly from the Indians without having to confront the government. Marshall did not, however, suggest that because the "title" of the government was better than that of the aborigines the Indians did not have any rights akin to title in the Anglo-sense.

The second Maine case involving the status of the Passamaquoddy Tribe, *State v. Newell*,[81] was decided in 1892. The defendant, a Passamaquoddy tribal member, had been indicted for hunting on the reservation in violation of state game laws. The defendant claimed immunity from state law on the grounds that the right to hunt on the particular lands was one confirmed to the tribe by treaty, and that Maine had assumed the duty to comply with treaty obligations under the Act of Separation.[82]

In fact he stated the opposite. A status of superior title in the government was only a means of defeating titles based on direct dealings by individuals with the Indians, not a means of demeaning Indian occupancy rights.

> On the discovery of this immense continent, the great nations of Europe were eager to appropriate to themselves so much of it as they could respectively acquire . . . . [T]he character and religion of its inhabitants afforded an apology for considering them as a people over whom the superior genius of Europe might claim an ascendency. The potentates of the old world found no difficulty in convincing themselves, that they made ample compensation to the inhabitants of the new, by bestowing on them civilization and Christianity, in exchange for unlimited independence. But as they were all in pursuit of nearly the same object, it was necessary in order to avoid conflicting settlements, and consequent war with each other, to establish a principle, which all should acknowledge as the the law by which the right of acquisition, which they all asserted, should be regulated, as between themselves. This principle was, that discovery gave title to the government by whose subjects, or by whose authority, it was made, against all other European governments, which title might be consummated by possession.

Id. at 572-73.

Marshall then went on to say that the principle of title by discovery, while it impaired the rights of the original inhabitants, did not destroy the Indians' claims as rightful occupants of the soil.

> The absolute ultimate title has been considered as acquired by discovery, subject only to the Indian title of occupancy, which title the discoverers possessed the exclusive right of acquiring. Such a right is no more incompatible with a seisin in fee than for a lease of years, and might as effectually bar an ejectment.

Id. at 592.

> It has never been contended, that the Indian title amounted to nothing. Their right of possession has never been questioned. The claim of government extents to the complete ultimate title, charged with this right of possession, and to the exclusive power of acquiring that right.

Id. at 603.

It is the Indian right of occupancy which constitutes original Indian title and has been considered by the federal courts as sacred as fee simple absolute in Anglo terminology. A status of superior title in the government was a means not of destroying Indian rights but of conferring on the government priority as against non-Indians as to extinguishment of Indian occupancy. The Maine courts, it appears, did not examine the depth of the concept.

[81] 84 Me. 465, 24 A. 943 (1892).

[82] *Id.* at 466, 24 A. at 943.

The *Newell* court found no mention of the Passamaquoddy Tribe in the treaties brought to its attention.[83] Hunting rights had not been specifically reserved by the treaty of 1794.[84] The absence of the tribe's designation as a party in the various earlier treaties was due to the tribe's close alliance and frequent joint treatment with the Malicite Tribe.[85] Furthermore, the 1760 treaty, which did reserve hunting rights to the Passamaquoddy Tribe, and which reaffirmed the presence of the tribe's representatives at the signing of the prior treaties, was not brought to the attention of the court.[86]

The most important aspect of the *Newell* opinion, however, is the finding by the court that even if Newell could have shown a treaty in which hunting rights were reserved to the tribe by name, he could no longer

[83] *See* note 24 *supra*. Newell, however, seemed to be unaware of the existence of a very significant later Treaty with the St. John and Passamaquoddy Indians, by the Crown, February 23, 1760, Halifax, Nova Scotia, which is on file at Public Archives, in Halifax, Nova Scotia. The language in this treaty seems to indicate that the Passamaquoddy tribe was a party to earlier treaties.

> Whereas Articles of Submission and Agreement were made and concluded at Boston in New England in the Year of our Lord 1725. . . .
> Which Articles of Submission and Agreement were confirmed at Halifax in Nova Scotia in the Year of our Lord 1749. George W. Mitchel Neptune Chief of the Tribe of Indians of Passamaquoddy and Ballomy Glode, Captain in the Tribe of Indians of St. John River . . . make and conclude . . . the renewal and future firm establishment of Peace and Amity between the said tribes of Passamaquoddy and St. Johns River Indians and his Majesty's other Subjects and to renew the Acknowledgement of the Allegiance of the said Tribes and their engagements to a perfect and constant Submission and Obedience to His Majesty King George the Second his Heirs and Successors. Do accordingly in the name and behalf of the said Tribes of Passamaquoddy and St. Johns hereby renew and confirm the aforesaid Articles of Submission and Agreement, and every part thereof and do solemnly promise and engage that the same shall forever hereafter be strictly observed and performed and We do hereby further promise and engage that this Treaty and every part thereof shall be Ratified by the Chiefs and Captains and other principal persons of the said Tribes of themselves and in behalf of their Tribes at Fort Frederic aforesaid on or before the 20th of May next.

[84] Even if *Newell* had relied only on the 1794 treaty the absence of specific mention of hunting rights in the treaty would not have impaired his right to hunt under federal court interpretation of federal Indian treaties. In United States v. Winans, 198 U.S. 371 (1904), the Court stated that a treaty was not a grant of rights to the Indians but a grant of rights from them—a reservation of those not granted. Since the treaty of 1794 did not cede the right to hunt it was retained as an original right.

[85] *See* Buesing, *supra* note 27, at 2-13, 38-42.

[86] Note 83 *supra*.

claim any rights under those treaties since the Passamaquoddy Tribe no longer existed.[87] As a basis for judicially legislating away the existence of the tribe, the court found that the tribe had lost its political organization and political existence, its continuity or succession of political life and power.[88]

> Though these Indians are still spoken of as the "Passamaquoddy Tribe," and perhaps consider themselves a tribe, they have for many years been without a tribal organization in any political sense. They cannot make war or peace, cannot make treaties; cannot make laws; cannot punish crime; cannot administer even civil justice among themselves. . . . They are as completely subject to the State as any other inhabitants can be. They cannot now invoke treaties made centuries ago with Indians whose political organization was in full and acknowledged vigor.[89]

The court relied solely on a United States Supreme Court case, *The Cherokee Trust Funds*,[90] dealing with the North Carolina Cherokees, for the proposition that in the view of the United States, the Passamaquoddy Tribe was no longer a tribe.[91]

III. The Sources of Maine's Power Over The Passamaquoddy Tribe.

The Maine Legislature's dealings with the Passamaquoddy Tribe, and the Maine Supreme Judicial Court's refusal to apply federal Indian law in *Granger* and *Newell*, can only be justified if the Passamaquoddies are not subject to the federal government's paramount power over Indian tribes. In the *Newell* decision, one possible source of Maine's power over the Passamaquoddy Tribe was premised upon extinction of the tribe as a legally cognizable unit.[92] The court considered the absence of certain characteristic elements of sovereignty to be indicative of tribal nonexistence in a legal sense. The Attorney General of Maine has interpreted *Newell*, not as suggesting that the tribe was not a tribe when the treaty was made, but as having lost its tribal existence subsequent to the treaty.[93] Accordingly, even if disintegration of the tribe, in fact, did occur subsequent to 1794, that disintegration would not of itself justify exercise of state power pursuant to the treaty of 1794. Also, prior to the judicial pronouncement of *Newell*, the Maine Legislature had already assumed, through the legislative process, total discretionary

[87] 84 Me. at 468, 24 A. at 944.

[88] *Id.*

[89] *Id.*

[90] 117 U.S. 288 (1886). For further discussion of this case see pp. 22-23 *infra*.

[91] 84 Me. at 466, 24 A. at 943.

[92] *Id.* at 468, 24 A. at 943-44.

[93] 1951-1954 Me. Att'y Gen. Rep. 202.

power over the Passamaquoddy Tribe.[94] Whether the legislature also felt that the basis of its power over the Passamaquoddy Tribe from the outset was the alleged disintegration of the tribe is unknown. The State of Maine may have assumed that the Commonwealth of Massachusetts enjoyed the exclusive power to deal with the tribe because it was located within one of the Original Thirteen Colonies and that therefore consent of the federal government had not been needed for Massachusetts' assumption of power, or that the federal government had at some point consented to Massachusetts' dealing with the tribe in 1794 and subsequently, as it saw fit.[95] The sources of Maine's power, therefore, are examined in terms of the premise of *Newell*, and the possible assumptions of the Maine Legislature.

A. The Premise of Newell

There are two elements which are generally required for determination that a tribe exists for purposes of application of paramount federal power. The first element is tribal existence in fact, which can be shown by many different kinds of evidence.[96] The second element is whether Congress has ever terminated tribal existence.[97] The second element is the most

[94] See text at pp. 10-11 *supra*.

[95] These represent the main arguments put forth by another of the original colonies, New York, as a basis for asserting exclusive state power over tribes within its borders. See text at pp. 25-38 *infra*.

[96] The cases usually look for evidence of recognition by treaty or law by the federal government to find factual existence. However, they do not stop there but look to the existence of tribal organization, the manner in which lands are held, and other factors. It is not enough that the government has recognized a tribe as a tribe since it cannot arbitrarily designate a group of people as an Indian tribe for purposes of supporting its power. Some cases do rely to a great extent on federal recognition as a basis for finding tribal existence. Perrin v. United States, 232 U.S. 478 (1914); The Kansas Indians, 72 U.S. (5 Wall.) 737 (1866); United States v. Holliday, 70 U.S. (3 Wall.) 407 (1866). The Supreme Court in United States v. Sandoval, 231 U.S. 28 (1913), placed great emphasis on such factors as separation and isolation, primitive ways of life, customs, government and civilization to find tribal existence. The Court did not depend upon federal recognition of the tribe as such since it had premised its analysis on the notion that the Congress could not arbitrarily treat any group as an Indian tribe. For a discussion of tribal existence, see FEDERAL INDIAN LAW, *supra* note 10, at 454-64.

[97] Termination of tribal existence must be demonstrated by a specific enactment of Congress to that effect. The purpose behind the General Allotment Act was to assimilate Indians into the mainstream of American life by granting them individual plots of land and citizenship. *See* note 64 *supra*. The United States Supreme Court construed the Act as intending to terminate tribal existence for Indians who accepted allotments of citizenship. Matter of Heff, 197 U.S. 488 (1905). Subsequently, the Supreme Court reversed itself and reversed the holding of *Heff* specifically in United States v. Nice, 241 U.S. 591 (1916). The Court in *Nice* found that the intent of the General Allotment Act had not clearly been

important one and really removes from the judiciary the power to base determination of issues involving tribal status upon consideration, or manipulation, of the first element alone. The Supreme Court has often said that the question of tribal status is one for the legislative branch to determine.[98]

To determine whether a tribe exists in the factual sense courts have often relied on congressional or executive acknowledgment of that existence.[99] Specific federal recognition of the status of the Passamaquoddy Tribe subsequent to the Union has consisted of only the providing of federal services to the tribe for a brief period in the 1820's.[100] However,

to end tribal relations and that subsequent actions of Congress had clarified that Congress did not intend by the Act to end tribal relations. This case has never been overruled.

[98] *E.g.*, United States v. Sandoval, 231 U.S. 28, 47 (1913); Lone Wolf v. Hitchcock, 187 U.S. 553, 565 (1902).

[99] *See* note 96 *supra*.

[100] On July 13, 1824, Senator Holmes of Maine wrote to the Secretary of War, John C. Calhoun, requesting funds for a school conducted by Elija Kellogg for the Passamaquoddy Indians at Pleasant Point. In his letter, Holmes suggested that the school be supported under an 1819 federal statute providing funds for the education of Indian children. Holmes believed that the Passamaquoddy could receive funds under this law without it being amended, but indicated that he would ask the Indian Affairs Committee to report out an amending bill if Calhoun thought it necessary. Apparently, Calhoun did not think this necessary because he subsequently approved a recommendation made by Commissioner McKenney of the Bureau of Indian Affairs, that $250 be paid annually for Kellogg's school.

Kellogg's school was operated between 1824 and 1828 with funds from federal, state, and private sources. Kellogg closed the school in 1828, after the priest for the predominantly Catholic Indian community at Pleasant Point demanded that he leave. Kellogg, a Protestant working for the Society for the Propagation of the Gospel, explained the closing in a letter to Calhoun's successor as Secretary of War, J.W. Eaton, dated May 4, 1829:

> I relinquished my school because the Catholic priests came in upon me, claiming the schoolhouse (disabling the lock) which I built six years since under the direction of the Secretary of War. No steps were taken by the late Secretary of War to restore the house to me, and I kept my school in Sock Basin's dwelling house. In the war of the revolution, where I served four whole years, I did not thus tamely submit to assailance; but in this case being smitten on one cheek, I turned the other also.

In the same letter, Kellogg noted that subsequent to the closing of the school, both the state and federal government stopped providing funds for the education of Passamaquoddy children. Correspondence from Schools, 1824-1829, Letters Received by the Office of Indian Affairs, Dept. of War, 1824-1880, National Archives, Washington, D.C.

In United States v. Boylan, 265 F. 165 (2d Cir. 1920), *appeal dismissed*, 257 U.S. 614 (1921), the court placed the most emphasis for federal recognition on a treaty made prior to the Union in 1784 between the Six Nations, one of whom was the Oneida Nation involved in the case, and the federal government. A treaty

specific recognition as a tribe by the federal government has never been the sole basis for determining when a tribe exists.[101]

The leading case on tribal existence considered by the United States Supreme Court is *United States v. Sandoval*,[102] in which the claim was made that the United States did not have power over the Pueblos of New Mexico because the Pueblos held their lands in fee simple.[103] The argument was presented that the absence of the typical trust relationship between the federal government and the tribes, concerning the land of the tribes, required a determination that the tribes were not tribes in the sense that would make them subject to the federal power.[104] The Supreme Court examined such aspects of the Pueblos as their customs, their separation and isolation, and their primitive ways, as a basis for concluding that the Pueblos were tribes for the purposes of federal control.[105] Essentially, the Court predicated its determination of tribal status upon the finding that the Pueblos were Indian communities. The Court, relying on *United States v. Kagama*,[106] went on to say:

was also made with the Passamaquoddy Tribe prior to the Union. *See* note 32 and accompanying text *supra*.

The whole tenor of the *Boylan* opinion suggests that federal recognition is merely one method to show tribal existence and is not determinative of tribal existence. The question in the case was whether the State of New York could by treaty in 1852 accept a surrender of lands to it. The defendant had title to some of the lands surrendered by the treaty by virtue of a grant from the State. The defense was that the tribe did not exist as a tribe but had been completely incorporated with the people of the State. The court found simply a status of separateness and validated not only federal power, but emphasized the federal guardianship duty strongly articulated by the Supreme Court of the United States in Heckman v. United States, 224 U.S. 413 (1911), to protect its Indian wards.

The *Boylan* court placed most emphasis on United States v. Nice, 241 U.S. 591 (1916), once factual separateness was found. *See* note 97 *supra*. It said that termination of existence would have to be expressed in clear terms. The court upheld the exercise of federal power in bringing the suit to eject the defendants, and further held that New York had no power to extinguish the right of Indian occupancy pursuant to the 1842 treaty. It therefore returned lands held by white citizens under grants from the state to the Oneidas. For further discussion of the case in relation to the status of the original colonies see text at p. 29 *infra*.

[101] *See* notes 96 & 100 *supra*.

[102] 231 U.S. 28 (1913).

[103] *Id.* at 30-34.

[104] *Id.*

[105] *Id.* at 43-49.

[106] 118 U.S. 375 (1886). In *Kagama*, the Court outlined an often repeated rational for federal protection of Indian Tribes:

> The power of the General Government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell. It must exist in that Government, because it never has existed anywhere else, because the theater of its exercise is within the geographical limits of the United States, because it has never been denied, and because it alone can enforce its laws on all the tribes.

> Not only does the Constitution expressly authorize Congress to regulate Commerce with the Indian tribes, but long continued legislative and executive usage and an unbroken current of judicial decisions have attributed to the United States as a superior and civilized nation the power and the duty of exercising a fostering care and protection over all dependent Indian communities within its borders, whether within its original territory or territory subsequently acquired, and whether within or without the limits of a State.[107]

In *Newell*, the court legislated away the existence of the Passamaquoddy Tribe on factors other than community of existence. The court conceded that community of existence was shared by the Passamaquoddy Tribe, and that it was spoken of as, and considered itself, a tribe.[108] However, the court turned to such factors as the tribe's inability to make war or peace, to make treaties or laws, or to administer civil or criminal justice among tribal members.[109] These factors have never been considered indicative of the nonexistence of a tribe.[110] Tribes throughout the country differ in the degrees to which they retain the elements of their former sovereignty. Also, Congress often has limited specifically tribal sovereignty without thereby impairing the existence of a tribe.[111] The *Newell* court also did not consider the extent to which the absence of the named elements of sovereignty of the Passamaquoddy Tribe was due to incursions upon that sovereignty by the State of Maine prior to 1892, the date of the *Newell* decision.

The legal test for tribal existence may essentially be a negative one, specifically, whether Congress has expressly terminated tribal status.[112] If Congress has done so, such as pursuant to the termination acts of the 1950's,[113] factual existence of the tribe as a tribe becomes irrelevant.[114] The tribe can continue to share a community of existence, but once Congress has surrendered its paramount power over it by specific enactment, factual existence of itself will not support attacks upon state assumption

Id. at 384-85.

[107] 231 U.S. at 45-46.

[108] 84 Me. at 468, 24 A. at 944.

[109] *Id.*

[110] *See* note 96 *supra*.

[111] *See* note 97 *supra*. Documentation of various enactments which have from time to time limited sovereignty without destroying tribal existence, particularly the Indian Bill of Rights which limited sovereignty in an effort to strengthen self-government are discussed at note 64 *supra*.

[112] United States v. Nice, 241 U.S. 591 (1916). This case is discussed at note 97 *supra*.

[113] *See, e.g.*, Act of June 17, 1954, ch. 303, 68 Stat. 250, *codified at* 25 U.S.C. §§ 891-902 (1964).

[114] FEDERAL INDIAN LAW, *supra* note 10, at 464. *See* note 115 *infra*.

of power.[115] This test is also consistent with Congress not having specifically recognized nor assumed to protect, through legislation or otherwise, all of the tribes in the United States at one time.[116] Lack of exercise of the federal paramount power at a given time did not mean that the federal government had surrendered that power, and lack of specific recognition of a tribe did not mean that a tribe did not exist within the meaning of the constitutional grant of federal power or within the meaning of the federal-Indian guardianship relation.[117]

The *Newell* court cited a Supreme Court case, *The Cherokee Trust Funds*,[118] to support the finding that the Passamaquoddy Tribe was no longer a tribe subject to the exercise of federal power. In *The Cherokee Trust Funds* the Supreme Court was considering a claim by the Cherokees who remained in North Carolina that they should receive a share of the funds set aside for the Cherokee Tribe in consideration of the tribe's removal west of the Mississippi.[119] The Court found that the claimants were not entitled to a share in the trust funds since they were no longer members of the Cherokee Tribe, but were subject to the laws of the State of North Carolina like any other citizens.[120]

What the *Newell* court ignored about the Supreme Court opinion was not only that the Court found that the Indians who remained in North Carolina no longer shared a community of existence,[121] but also that the

[115] It is clear, however, that a state cannot impose its laws for all purposes over a tribe even if Congress has specifically terminated a tribe's existence for the purposes of exercise of federal power. After Menominee termination, the State of Wisconsin took the position that the Menominees were subject to her hunting and fishing regulations. Wisconsin prosecuted Menominees for violating those regulations and the Supreme Court of Wisconsin validated the state regulations, feeling that Congress had abrogated Menominee fishing and hunting rights through the termination act of 1954. The Supreme Court of the United States reversed holding that the termination act ceded federal supervision over the Menominee tribe to Wisconsin, but did not intend to abrogate rights guaranteed to the tribe by treaty. Menominee Tribe v. United States, 391 U.S. 404 (1968). This case, like *United States v. Nice*, not only suggests that a specific enactment of Congress is needed to terminate tribal status, but that the specific enactment must be closely scrutinized to see what precise power it confers on a state. In other words, power conferred upon the state for one or several purposes may not properly be deemed a grant of power to a state to deal with a terminated tribe at its whim.

[116] See New York *ex rel.* Cusick v. Daly, 212 N.Y. 183, 105 N.E. 1048 (1914).

[117] *Id.* at 196-97, 105 N.E. at 1051-52.

[118] 117 U.S. 288 (1886).

[119] *Id.*

[120] *Id.* at 308-10.

[121] 117 U.S. at 309 (1885):

> The Cherokees in North Carolina dissolved their connection with their Nation when they refused to accompany the body of it on its removal, and they have had no separate political organization since. Whatever

Court dealt mainly with the "legal" test of tribal existence.[122] Congress had by treaty with the Cherokee Tribe, as it appeared to the Court, terminated tribal existence of its Cherokees in North Carolina by removing them west of the Mississippi.[123] Even if the Cherokees who remained in North Carolina could have shown factual community of existence, such a showing would have been irrelevant in light of Congress having apparently terminated the existence of the Cherokee Tribe in North Carolina by removing it from that state. In view of the claim presented to the Court, which was that the North Carolina Cherokees were entitled to share the funds of the removed tribe, the decision was consistent with federal principles applicable to tribal existence. The Court also did not intimate that Congress at a future time could not demonstrate its desire to continue exercising its federal power over the Indians who remained in North Carolina if tribal existence should be re-established.

Subsequently, the Cherokees who remained in North Carolina grouped together with the help of a grant of land made by a private citizen,[124] and the federal government proceeded to deal with the community as a tribe subject to the federal paramount power.[125] In numerous cases this exercise of federal power was attacked on the basis that the North Carolina Cherokees no longer constituted a tribe,[126] that the land on which they regrouped had not been granted to them by the United States and had always been a part of the territory of North Carolina,[127] and on the basis of the *Cherokee Trust Funds* opinion.[128] However, once it was clear from federal government action that Congress had not intended to surrender its power over the Indians who remained in North Carolina, but merely intended to terminate the membership of those Indians in the tribe which was removed to the West, the federal courts continuously validated the exercise of federal power over the North Carolina tribe.[129]

> union they have had among themselves has been merely a social or business one.

[122] *See* note 112 and accompanying text *supra*.

[123] For full discussion of the terms of the treaty see United States v. Wright, 53 F.2d 300 (4th Cir. 1931); United States v. Boyd, 83 F. 547 (4th Cir. 1897).

[124] See discussion of this aspect of the tribe's resurrection in United States v. Parton, 46 F. Supp. 843 (W.D.N.C. 1942), *rev'd*, 132 F.2d 886 (4th Cir. 1943).

[125] United States v. Parton, 132 F.2d 886 (4th Cir. 1943).

[126] *Id.*; United States v. Wright, 53 F.2d 300 (4th Cir. 1931).

[127] United States v. Colvard, 89 F.2d 312 (4th Cir. 1937).

[128] Heavy reliance was placed upon this case at the district court level in United States v. Parton, 46 F. Supp. 843 (W.D.N.C. 1942). See discussion at note 129 *infra*.

[129] Blair v. McAlhaney, 123 F.2d 142 (4th Cir. 1941); United States v. 7,405.3 Acres of Land, 97 F.2d 417 (4th Cir. 1938); United States v. Colvard, 89 F.2d 312 (4th Cir. 1937); United States v. Wright, 53 F.2d 300 (4th Cir. 1931); United States v. Boyd, 83 F. 547 (4th Cir. 1897). The Fourth Circuit in validating federal power in these cases relied on such cases as Chippewa Indians v. United

There is no evidence that Congress ever specifically terminated the existence of the Passamaquoddy Tribe for any purpose. There is no question that the Passamaquoddy Tribe shares a community of existence. The *Newell* court conceded this fact.[130] The power which Maine has assumed to deal with the tribe as an enclave of disenfranchised citizens bereft of any special status has, therefore, no basis in the alleged fact of the tribe's nonexistence. The tribe, subsequent to the treaty of 1794, did lose much of the autonomy which is characteristic of the factual existence of many tribes at the federal level, but this was due to the exercise of Maine's highly questionable asserted power to deal with the tribe at its whim, not to the tribe's nonexistence. In other words, some of the elements of sovereignty and characteristics of tribal existence were undermined by the exercise of the State's power, but this power could not have its source in factual disintegration of the tribe.

The premise of *Newell*, even if valid, would not support Massachusetts' exercise of power over the Passamaquoddy Tribe through the treaty of 1794. From the history of the tribe, described earlier,[131] and the Maine Attorney General's interpretation of *Newell*,[132] the premise was founded upon events subsequent to 1794. The possible sources for Massachusetts' exercise of power in 1794 for the purpose of dealing with Passamaquoddy lands, therefore, must be examined regardless of *Newell*. Since the premise of *Newell* is invalid, alternative sources also must be found to support Maine's exercise of total discretionary power over the tribe.

B. *The Status of the Original Colonies*

1. Power over Indian Lands.—In 1790, Congress enacted the first Indian Non-Intercourse Act pursuant to the powers granted to the federal government by the Constitution.[133] This Act declared that:

States, 307 U.S. 1 (1939); United States v. McGowan, 302 U.S. 535 (1938); United States v. Sandoval, 231 U.S. 28 (1913) (discussed at pp. 20-21 *supra*); United States v. Rickert, 188 U.S. 432 (1903); The Kansas Indians, 72 U.S. (5 Wall.) (1866).

The most recent federal case involving the tribal status of North Carolina's Cherokees was United States v. Parton, 46 F. Supp. 843 (W.D.N.C. 1942), *rev'd*, 132 F.2d 886 (4th Cir. 1931). The United States there claimed that the defendants needed a license to trade with these Indians under a federal statute, as members of a tribe within the meaning of the statute. The district court placed great reliance on *Cherokee Trust Funds*, and as in *Newell*, on such factors as the absence of elements of their former sovereignty, and the fact that the federal government had never recognized them as a nation of Indians. The Fourth Circuit Court of Appeals summarily reversed the district court with a string of citations to *Sandoval* and other cases without even bothering to discuss the arguments below.

[130] 84 Me. at 468, 24 A. at 944.

[131] *See* pp. 6-9 *supra*.

[132] *See* note 93 *supra*.

[133] For a history and discussion of Non-Intercourse Act, see note 8 *supra*.

> [N]o sale of lands made by any Indians, or any nation or tribe of Indians within the United States, shall be valid to any person or persons, or to any state, *whether having the right of preemption to such lands or not*, unless the same shall be made and duly executed at some public treaty, held under the authority of the United States.[134]

This enactment was revised in 1793 and made negotiations with Indians for the sale of their lands subject to criminal penalties, but allowed state agents to be present at the making of any treaty by the United States.[135] State agents would be permitted to help negotiate the compensation for any Indian claims to be extinguished by the treaty. The same legislation has been re-enacted many times and remains a part of federal Indian law today.[136]

The right of preemption over Indian lands, to which the Non-Intercourse Act referred, was a principle that international jurists had fashioned at the time the American continent was discovered.[137] According to international doctrine, the act of discovery gave the sovereign by whose subjects discovery was made title to the land so discovered, subject only to the Indian right of occupancy, and vested in that sovereign alone the

[134] Act of July 22, 1790, ch. 33, §4, 1 Stat. 138 (emphasis added). The purpose behind the enactment seems to have been to stem the tide of individual and state encroachments upon Indian lands during the period of the Articles of Confederation. The power which the states retained under the Articles of Confederation to deal with Indian tribes is discussed at pp. 33-34 *infra*. For an excellent historical study of events giving rise to the Non-Intercourse Acts and events occurring during their early applicability see F. PRUCHA, AMERICA INDIAN POLICY IN THE FORMATIVE YEARS: THE INDIAN TRADE AND INTERCOURSE ACTS 1790 - 1834 (1962).

Speaking to the Seneca tribe of New York in 1790, President George Washington had the following to say about the Non-Intercourse Act and its applicability to New York Indians:

> I must inform you that these evils [Indian land sale difficulties] arose before the present Government of the United States was established, when the separate States, and individuals under their authority, undertook to treat with the Indian tribes respecting the sale of their lands. But the case is now entirely altered; the General Government, only, has the power to treat with the Indian nations, and *any treaty formed, and held without its authority, will not be binding.*
>
> Here, then, is the security for the remainder of your lands. No State, nor person, can purchase your lands, unless at some public treaty, held under the authority of the United States. The General Government will never consent to your being defrauded, but it will protect you in all your just rights.

4 AMERICAN STATE PAPERS 142 (1 Indian Affairs, 1832) (emphasis added).

[135] *See* note 8 *supra*.

[136] *See* note 8 *supra*.

[137] Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543 (1883). See the editorial

preemptive right to extinguish Indian occupancy.[138] The right was one which attached to sovereignty and precluded individuals from receiving land from an Indian tribe without the consent of the sovereign.[139]

Title to lands in the original colonies passed directly from the Crown to those colonies, subject to the Indian right of occupancy. Title to land outside of the original colonies was, at one time or another, vested in the United States before being granted to the several states or being set aside for the purposes of Indian reservations, or for other federally-related purposes. Consequently, it has often been argued that the power of the federal government over Indian tribes in the original colonies is not coextensive with federal power over tribes in the West.[140] Much of the argument has centered around the power of New York to deal with lands of Indian tribes residing in that state.[141]

In 1786, New York and Massachusetts entered into a compact in settlement of a controversy which had arisen with respect to power and jurisdiction over lands which were within the chartered limits of New York, but which Massachusetts claimed were in the charter of the colony of Massachusetts Bay. By the terms of the compact, Massachusetts ceded to the State of New York the right of government over the lands in question, and New York ceded to Massachusetts the right of preemption to extinguish Indian occupancy rights to approximately 6,000,000 acres of land in western New York. Massachusetts was authorized by this compact to treat with the Indians to acquire their rights in the land. The compact also conferred authority on Massachusetts to transfer its right of preemption to individual grantees.[142] The compact was ratified by the United States after the adoption of the Constitution.[143]

introduction to volume of *Statutes at Large* containing Indian treaties for discussion of the principles of discovery. 7 Stat. 1-11.

[138] Cohen, *Original Indian Title*, 32 MINN. L. REV. 28 (1947).

[139] See discussion in note 80 *supra.*

[140] Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831).

[141] *See, e.g.*, Fellows v. Blacksmith, 60 U.S. (19 How.) 366 (1856); United States v. Boylan, 265 F. 165 (2d Cir. 1920), *appeal dismissed*, 257 U.S. 614 (1921); United States v. Forness, 37 F. Supp. 337, *rev'd*, 125 F.2d 928, *cert. denied*, 316 U.S. 694 (1942); Buffalo R. & P. R.R., Co. v. Lavery, 75 Hun. (N.Y.) 396 (1894), *aff'd on opinion below*, 149 N.Y. 576, 43 N.E. 986 (1896). *See also* FEDERAL INDIAN LAW, *supra* note 10, at 965-85; Gunther, *Governmental Power and New York Indian Lands—A Reassessment of a Persistent Problem of Federal State Relations*, 8 BUF. L. REV. 1 (1958); Pound, *Nationals Without A Nation: The New York State Tribal Indians*, 22 COLUM. L. REV. 97 (1922).

[142] The compact is discussed in The New York Indians, 72 U.S. (5 Wall.) 761 (1866); Fellows v. Blacksmith, 60 U.S. (19 How.) 366 (1856); Seneca Nation of Indians v. Christie, 126 N.Y. 122, 27 N.E. 275 (1891), *appeal dismissed*, 162 U.S. 283 (1895).

[143] This fact was stipulated in Seneca Nation of Indians v. Christie, 127 N.Y.

In 1857, in *Fellows v. Blacksmith*,[144] the Supreme Court of the United States had its first opportunity to consider the power of the federal government over Indian lands in New York. Individuals, claiming the right of preemption over certain Seneca lands in New York, by virtue of a grant of that right from Massachusetts, had sought to eject certain Senecas after allegedly extinguishing their rights by purchase. The Supreme Court held that only the federal government could extinguish the Indian occupancy right subsequent to adoption of the Constitution, and that any rights in the subject lands which Massachusetts had conveyed to its grantees were conditional upon the federal government's extinguishment of the occupancy right.[145] Ratification of the interstate compact by Congress was apparently not considered by the Court to have been a surrender of federal power over the lands in question.

Fellows might have precluded further arguments for state power over Indian lands if it had not been decided at a time when the government was still dealing with Indian tribes as if they were semi-sovereign nations. In 1871, however, Congress passed a law changing the method of dealing with the tribes from treaty to statute,[146] and in 1885, Congress vested federal courts with jurisdiction over major crimes committed by Indians

122, 132, 27 N.E. 275, 279 (1891). *See* Gunther, *Governmental Power and New York Indian Lands—A Reassessment of a Persistent Problem of Federal-State Relations*, 8 BUF. L. REV. 1, 6 n. 29 (1958). The ratification seems to have been by means of congressional ratification of a contract between the Seneca Indians and a grantee of the preemptive right from Massachusetts. In the opening paragraph of the contract ratification Congress stated:

> Whereas the Commonwealth of Massachusetts have granted, bargained, and sold unto said Robert Morris, his heirs and assigns, forever, the pre-emptive right, and all other the right, title, and interest, which the said Commonwealth had to all that tract of land hereinafter particularly mentioned, being part of a tract of land lying within the State of New York, the right of pre-emption of the soil whereof, from the native Indians was ceded and granted by the said State of New York, to the said Commonwealth . . . .

Contract Entered Into, Under the Sanction of the United States of America, between Robert Morris and the Seneka Nation of Indians, Sept. 15, 1797, 7 Stat. 601. Numerous recitations as to the content of the New York-Massachusetts compact are also contained in the contract ratification. It is also explicitly recited that the contract was made in conformity with the provisions of the Non-Intercourse Act.

[144] 60 U.S. (19 How.) 366 (1856).

[145] *Id.* at 371-72.

[146] Act of March 3, 1871, ch. 120, § 1, 16 Stat. 566, *codified at* 25 U.S.C. § 71 (1964). *See* note 12 *supra.*

on reservations, jurisdiction which the tribes had enjoyed previously.[147] Subsequently, in 1887, Congress passed the General Allotment Act with the avowed purpose of disintegrating Indian tribes and assimilating Indians into the mainstream of American life.[148] It may have been hoped that the judiciary, state or federal, would adopt legal theory to this changing federal policy.

Resurrection of claims to state power over Indian lands based on the unique status of the original colonies came in a decision of the New York Court of Appeals in *Seneca Nation of Indians v. Christie*[149] in 1891. The Seneca Tribe sought to void a sale of lands made by the tribe in 1826 to certain individuals who possessed the right of preemption to extinguish Indian occupancy rights as a result of a grant from Massachusetts similar to the grant involved in *Fellows*. Among the tribe's contentions was one that the grant violated the terms of the Non-Intercourse Act.[150] The court emphasized the changing federal policy as demonstrated by the enactments of Congress in 1871, 1885, and 1887,[151] and found compliance with the Non-Intercourse Act in the presence of United States commissioners at the 1826 sale, but indicated that compliance might not be required because of New York's status as one of the original colonies. Among the court's arguments for New York's power to deal freely with Indian lands were that the original states succeeded to the rights of their grantor, the Crown, which included the right of preemption to extinguish Indian occupancy,[152] and that the original states had often exercised the power which had been vested in the Crown independently of the United States subsequent to the adoption of the Constitution.[153]

In 1894, a New York court decision restricted *Christie* to its holding that the 1826 grant had been in compliance with the Non-Intercourse Act. In *Buffalo, R. & P.R.Co. v. Lavery*,[154] two non-Indians claimed leasehold interests in a piece of property. One claimed under a lease from the Senecas authorized by a state statute. The other claimed under a lease

[147] Act of March 3, 1885, ch. 341, § 9, 23 Stat. 385, *as amended*, 18 U.S.C. § 1153 (Supp. V, 1970).

[148] Act of February 8, 1887, ch. 119, 24 Stat. 388, *as amended*, 25 U.S.C. §§ 331-416J (1964, Supp. V, 1970). *See* note 64 *supra*.

[149] 126 N.Y. 122, 27 N.E. 275 (1891).

[150] *Id.* at 124, 27 N.E. at 275.

[151] *Id.* at 139, 27 N.E. at 279.

[152] *Id.* at 136, 27 N.E. at 278.

[153] *Id.* at 137, 27 N.E. at 278-79.

[154] 75 Hun. 396, 27 N.Y.S. 443 (S. Ct. 1894), *aff'd on opinion below*, 149 N.Y. 576, 43 N.E. 986 (1896).

authorized by the federal government by an 1875 enactment.[155] The court held that:

> [I]t is not within the legislative power of the State to enable the Indian nation to make or others to take from the Indians, grants or leases of lands within their reservations. In that matter the Federal government, having the power under the Constitution to do so, has assumed to control it by the act of Congress of June 30, 1834 [a successor to the earlier Non-Intercourse Acts] . . . . As respects their lands, subject only to the pre-emptive title, the Indians are treated as the wards of the United States, and it is only pursuant to the Federal authority that their lands can be granted or demised by or acquired by conveyance or lease from them. . . .[156]

Subsequently, New York's Court of Appeals did adopt the arguments made in *Christie* in support of a unique power for New York over Indian lands,[157] but in 1920 the Second Circuit Court of Appeals rejected these arguments in *United States v. Boylan*.[158] The question in *Boylan* was whether the State of New York had the power in 1852 to accept a surrender of lands from the Oneida Indians. The defendants, whom the United States sought to eject from Oneida lands, held the lands in question by virtue of a grant from the State. The court held that the United States government had the sole power to legislate with respect to the lands of Indians in the State of New York.[159] The court recognized that the ultimate fee to Indian lands was in the State, but found that the State or its grantees could receive no rights in Indian lands until Congress had extinguished Indian title. Since Congress had not done so, and since the 1852 grant did not comply with the Non-Intercourse Act, the grant was held not to effect a legal conveyance.

In 1958, in *Tuscarora Nation of Indians v. Federal Power Authority*,[160] the issue of New York's power over Indian lands based on its status as

[155] Act of Feb. 19, 1875, ch. 90, 18 Stat., pt. 3, at 330.

[156] 75 Hun. 396, 399-400, 27 N.Y.S. 443, 444-45 (Sup. Ct. 1894).

[157] Heavy reliance was placed by New York's highest court on *Christie* in Jemison v. Bell Telephone Co., 186 N.Y. 493, 79 N.E. 728 (1906), where the court found that the State of New York exercised exclusive sovereignty and jurisdiction over the Seneca Tribe. Since the New York Court of Appeals appeared to think that the Supreme Court of the United States had affirmed *Christie*, at least to the extent that such might be implied from its incorrect citation to the case's subsequent history, this factor may also have affected the weight which the court gave to the earlier case. The subsequent history of *Christie* in the Supreme Court is briefly discussed in note 12 *supra*.

[158] 265 F. 165 (2d Cir. 1920), *appeal dismissed*, 257 U.S. 614 (1921).

[159] *Id.* at 173.

[160] 164 F. Supp. 107 (W.D.N.Y.) *modified*, 257 F.2d 885 (2d Cir. 1958). Prior to the trial in the district court, the Tuscaroras appealed the order of the Federal Power Commission, which had approved the taking of Tuscarora lands, to the Court of Appeals for the District of Columbia Circuit. The latter circuit rendered a decision subsequent to the decision of the Second Circuit which remanded the

one of the original colonies seems to have been finally resolved. The Power Authority of the State of New York, a licensee of the Federal Power Commission [FPC], to which Congress had delegated its authority concerning water power and hydroelectric development, had sought to take lands of the Tuscarora Tribe in a state eminent domain proceeding. The tribe claimed that the Federal Power Act had not conferred authority upon the FPC to license the state agency to take Indian lands, and that the state agency violated the federal paramount power over the tribes and the Non-Intercourse Act.[161] The lands in question not only had never been owned by the United States, but were not held as original lands of the tribe and in fact, had been purchased by the tribe.[162] The situation appeared ripe for the State to go far beyond the issue of whether the Federal Power Act conferred consent to the taking and to reassert its claimed unique power over at least some Indian lands.

The federal district court in *Tuscarora* found that the State had the power to take Tuscarora lands under state authorized eminent domain proceedings, regardless of the prescriptions of the Federal Power Act. The court placed great reliance on *Seneca Nation of Indians v. Christie*,[163] and accepted the many arguments which had been made in that case for a special power over Indian lands being vested in New York.[164] The State also did not have to comply with the Non-Intercourse Act because of its status as one of the original colonies. The court concluded:

> Whatever interest the United States has in the New York Indians is directed not to Indian lands as such, but to something more vague and general, such as their general welfare.[165]

The Court of Appeals for the Second Circuit rejected in every respect the State challenge at the district court level to federal authority over New York Indian lands. The appellate court disagreed that the Non-Intercourse Act was not applicable to New York.[166] The State had to

case to the Federal Power Commission to make a finding under section 4(e) of the Federal Power Act. 265 F.2d 338 (D.C. Cir. 1958). The Federal Power Act requires that the Federal Power Commission find that the taking of Indian reservation lands will not interfere with the purpose for which the reservation was created. 16 U.S.C. § 797(e) (1964). The Federal Power Commission thereupon found that the taking would violate this prescription of the Act. Subsequently, the District of Columbia Circuit entered its final order that Tuscarora lands could not be taken. 265 F.2d at 344. The cases were consolidated before the United States Supreme Court. Federal Power Commission v. Turcarora Indian Nation 362 U.S. 99 (1960).

[161] 164 F.Supp. at 109.

[162] *Id.* at 110-11.

[163] 126 N.Y. 122, 27 N.E. 275 (1891).

[164] 164 F.Supp. at 113.

[165] *Id.* at 115.

[166] 257 F.2d at 888-89.

comply with the Non-Intercourse Act or consent to the taking of Indian lands had to be manifested by the United States Congress.[167] A course of dealing by New York with the Indian tribes had often resulted in the State taking Indian lands without congressional authorization. This was due to the indifference or approval of officials in the Department of the Interior charged with responsibility for protecting Indian rights.[168] During all of this time, nonetheless, the New York Indians were wards of the United States and not of the State of New York. The federal appellate court relied to a great extent in its opinion on New York State court opinions which from time to time had rejected any special status for New York over Indian lands.[169]

The Court of Appeals did find that Congress had consented to the taking of Tuscarora lands by the terms of the Federal Power Act, and that the New York Power Authority could take the lands by following the procedures prescribed by the Act.[170] When the case reached the Supreme Court in 1960,[171] the majority also found that the Federal Power Act had authorized the grant of a license by the FPC to the Power Authority to take the subject lands. Since the Non-Intercourse Act was not applicable to the United States itself, it also was not applicable to its licensees.[172] The Court did not even consider the arguments which had been presented and accepted at the district court level. No suggestion was ever intimated that congressional consent to the taking was not required. Justice Black, vigorously dissenting from the majority's finding, felt that Congress should unequivocally demonstrate its intent to consent to the taking before the Court approved it, and expressed his regret "that this Court is to be the government agency that breaks faith with this dependent people." [173]

2. *Power over Indian Affairs.*—In 1942, in *United States v. Forness*, the Second Circuit Court of Appeals categorically stated that the laws of the State of New York did not apply to Indians without the express consent of Congress.[174] For the most part, prior to that time the courts had been unwilling to examine the issue of whether the State could

[167] *Id.* at 893.

[168] *Id.* at 889.

[169] The court gave particular attention to New York *ex rel.* Cusick v. Daly, 212 N.Y. 183, 105 N.E. 1048 (1914), which had held that federal government had never relinquished its power over New York tribes to the State of New York. *Daly* is discussed at p. 36 *infra.*

[170] For a very good criticism of this aspect of the case see 72 HARV. L. REV. 1372 (1959). This note would agree with Justice Black's dissenting opinion, 362 U.S. at 125-41, when the case was subsequently decided by the Supreme Court.

[171] Federal Power Commission v. Tuscarora Indian Nation, 362 U.S. 99 (1960).

[172] *Id.* at 120.

[173] *Id.* at 142.

[174] 125 F.2d 928 (2d Cir. 1942).

legislate in an area of Indian affairs if the federal government had not acted in that area.[175] The jurisdictional rule outside of New York, ever since the *Cherokee* cases[176] in 1831 and 1832, until at least 1958, had been that state laws did not run on reservations in matters involving Indians without the express consent of Congress.[177] Subsequent to *Forness*,

[175] *See, e.g.*, Mulkins v. Snow, 232 N.Y. 47, 133 N.E. 123 (1921). There the court denied jurisdiction to state courts to hear a complaint over which tribal courts had jurisdiction. Justice Pound declined to decide the issue of whether the state had jurisdiction in the absence of federal action in an area of Indian affairs.

> When the state of New York legislates in relation to their [Indian] affairs, its action is subject to the paramount authority of the federal government. The contention has been made with some force that when Congress does not act, no law runs on an Indian reservation save the Indian tribal law and custom . . . . The principle that state laws may not apply to tribal reservation Indians in the absence of affirmative legislation on the part of Congress need not, however, be adopted.

Id. at 51, 133 N.E. at 124.
But see United States v. Boylan, 265 F. 165 (2d Cir. 1920), *appeal dismissed*, 257 U.S. 614 (1921), where the court stated that Congress has the sole power to legislate in Indian affairs as well as over Indian lands. This decision did not create the same concern among state legislators as *Forness*, probably because it was thought that *Boylan* could be restricted to cases of lands and the Non-Intercourse Act. Also one year after *Boylan* the learned Judge Pound refused to decide the issue in *Mulkins*.

[176] *See* note 7 *supra*.

[177] In Williams v. Lee, 358 U.S. 217, 219-20 (1959), the Supreme Court held that state law could apply without express consent of Congress if the state law did not infringe upon the right of reservation Indians to make their own laws and be governed by them. Prior to *Williams* there were some cases in which the Supreme Court had allowed state laws to run on Indian reservations in the absence of federal consent, but a close examination of the cases demonstrates that Indians had no interest in the nonapplication of state laws. For a discussion of this line of cases which caused some misunderstandings in New York see p. 35 *infra*. Also prior to *Williams*, cases such as United States v. Nice, 241 U.S. 591 (1916), demonstrated that the Court would not lightly imply consent by Congress to application of state law. See discussion of *Nice* at note 97 *supra* and discussion of Menominee Tribe v. United States, 391 U.S. 404 (1968), in note 115 *supra*. A principle of construction which in part enables, if not compels, the Court not to imply consent lightly is that all Indian legislation is to be interpreted in a manner that would favor the Indians. This idea is deeply rooted in the relationship of the United States to a dependent people. Alaska Pacific Fisheries Co. v. United States, 248 U.S. 78, 89 (1918); Choate v. Trapp, 224 U.S. 665, 675 (1912). For a discussion of jurisdictional developments in this area up to, and subsequent to, *Williams* see Comment, *The Indian Battle for Self-Determination*, 58 CAL. L. REV. 444 (1970). The Court in Federal Power Commission v. Tuscarora Indian Nations, 362 U.S. 99 (1960), did go out of its way to find congressional consent, but it was also obviously very much impressed with the great sums of money and preparation which had gone into the Niagara power project. Justice Black, vehemently dissenting, noted the numerous cases from which the *Tuscarora* Court was deviating.

the New York Legislature sought to have Congress specifically confer state criminal jurisdiction over New York tribes. Congress finally passed such legislation in 1948,[178] and in 1950 extended state civil jurisdiction over the New York tribes.[179] The hearings behind these enactments make it clear, however, that numerous people felt that a specific enactment was needed only because of the *Forness* decision, and not, in fact, because New York did not enjoy a different status in relation to legislating on Indian affairs than the states in the West.[180] Examination of court decisions other than *Forness*, however, do not support the proposition that the jurisdictional rule for state law over Indian affairs should ever have been deemed to differ from the rule applicable in states which were not original colonies.[181]

In 1832, Chief Justice Marshall decided a landmark case in constitutional and Indian law. The case, *Worcester v. Georgia*,[182] involved the claim by the State of Georgia, one of the original colonies, that it had the power to enforce state laws on the Cherokee Indian Reservation. The plaintiff was a Vermont minister who had been condemned to hard labor for four years in the penitentiary of Georgia for committing the offense of residing within the limits of the Cherokee Reservation without a state license. The minister, a devout preacher of the Gospel to the Cherokees,[183] claimed that the state law was repugnant to the United States Constitution as infringing upon the federal government's paramount power over Indian tribes.

Marshall, in *Worcester*, set out to fully examine the rightfulness of a former colony's assertion of jurisdiction over an Indian tribe within its borders. He began with the European discovery of the American continent and affirmed the international law doctrine that discovery gave title to the government by whose subjects or authority it was made as against all other European governments. Title by discovery did not confer any rights, however, as against native populations in occupation of the discovered lands. This title merely conferred the preemptive right to extinguish the occupancy right of the Indians.

The Chief Justice then went on to consider the divisions of power between the federal government and the states over Indian tribes under the Articles of Confederation, and noted the ambiguities in the grant of

[178] Act of July 2, 1948, ch. 809, 62 Stat. 1224, *codified at* 25 U.S.C. § 232 (1964).

[179] Act of Sept. 13, 1950, ch. 947, § 1, 64 Stat. 845, *codified at* 25 U.S.C. § 233 (1964).

[180] *Hearings before a Subcomm. of the Comm. on Interior and Insular Affairs on S. 683, S. 1686, S. 1687*, 80th Cong., 2d Sess. 81-83, 184-87, 210-21 (1948).

[181] *See* note 176 *supra*.

[182] 31 U.S. (6 Pet.) 515 (1832).

[183] *Id.* at 538.

power to the federal government in light of its limitation in favor of the states, a limitation which at least two states had construed as nullifying completely the grant of power.[184] However, all ambiguities were resolved by the adoption of the Constitution. "The shackles imposed on this [federal] power, in the confederation, are discarded." [185] The Cherokee Tribe was a distinct community, occupying its own territory, in which the laws of Georgia could have no force since these laws represented an attempted usurpation of the federal government's power.

Worcester would appear to have extinguished any further claims to state jurisdiction over Indian tribes stemming from original colonial status. In 1857, however, the Supreme Court decided a case involving New York's Indians which provided the impetus for the reassertion of a unique state power. This case, *New York ex rel. Cutler v. Dibble*,[186] has often been cited to support a different state jurisdictional rule than that applicable to the states in the West.

In *Dibble*, the Court upheld the validity of a law enacted by New York which enabled the State to remove from Seneca lands white people trespassing on the lands. The Court stated that New York could protect the New York Indians in their peaceful possession until the federal government had removed the tribes from the State.[187]

Nothing in *Dibble* suggested that New York enjoyed any special powers over tribes residing therein. The Court characterized the state legislation as protective legislation affecting non-Indian citizens of the State enacted pursuant to the State's police power over its citizens.[188] The Court did not distinguish *Worcester*. *Worcester*, however, can be distinguished on the grounds that there Georgia sought to punish an individual who had entered the Cherokee reservation by permission of the tribe and the President of the United States.[189] In *Dibble*, non-Indian citizens of the State were attempting to take possession of Seneca lands contrary to the wishes of the tribe and the federal government. Nonetheless, in holding that the laws of New York were enforceable on the Seneca Reservation, regardless of whether they interferred with Seneca self-government or federal policy, the Court appeared to retreat from its holding in *Worcester*, and provided the basis for reassertion of state power.

A subsequent opinion of the Supreme Court in 1867 in *The New York Indians*[190] made clear that the freedom which it allowed the State of New York to impose certain laws over the Indian reservation in *Dibble* was not due to any special status of the state-Indian relationship. In *The New York Indians*, the Court ruled that New York did not have any power to impose state taxation laws on Indian reservations until the federal government had removed the Indians from the lands. The Court fully relied on its decision in *The Kansas Indians*,[191] decided the same term, which involved the attempt by a state which was not one of the original colonies to tax Indian lands within its territory. Furthermore, in numerous decisions of the Supreme Court subsequent to *Dibble*, the same exception to federal jurisdiction and power was fashioned in cases not involving the power of states which were original colonies. For example, in 1880 the Court validated the use of state courts to resolve a dispute between two non-Indians over property on an Indian reservation in Idaho,[192] and in 1881 in *United States v. McBratney*[193] the Court approved the assertion of state jurisdiction over an offense committed by a non-Indian against a non-Indian on an Indian reservation. In 1946, prior to the time that Congress extended state criminal jurisdiction over Indian tribes in New York, the Court relied on *McBratney* and *Dibble* to find that New York had jurisdiction of a murder of one non-Indian by another non-Indian on a reservation, explaining that in matters involving non-Indians on Indian reservations, the states have jurisdiction unless Congress has specifically denied them jurisdiction in this regard.[194] The Court went on to say:

> The entire emphasis in treaties and Congressional enactments dealing with Indian affairs has always been focused upon the treatment of the Indians themselves and their property. Generally no emphasis has been placed on whether state or United States courts should try white offenders for conduct which happened to take place upon an Indian reservation, but which did not directly affect the Indians.[195]

The rule which emerged from *Worcester* was a jurisdictional rule which applied to all states. The state involved was one of the original colonies and the decision was continuously reaffirmed in dealing with states in the West. Following *Worcester*, at least until 1958 when the Supreme Court carved something of an inroad upon the rule,[196] no state could extend its laws over Indian reservations within its borders without congressional consent. An exception to this rule of jurisdiction, or a collateral rule, fashioned by *Dibble* was that where the matter involved state assertion of power over non-Indians, even where the conduct occurred on a reservation, the state could entertain jurisdiction unless Congress

184 *Id.* at 558.
185 *Id.* at 559.
186 62 U.S. (21 How.) 366 (1858).
187 *Id.* at 371.
188 *Id.*
189 31 U.S. (6 Pet.) at 538.
190 72 U.S. (5 Wall.) 761 (1866).
191 *Id.* at 737.
192 Langford v. Monteith, 102 U.S. 145 (1880).
193 104 U.S. 621 (1881).
194 New York *ex rel.* Ray v. Martin, 326 U.S. 496 (1946).
195 *Id.* at 501.
196 *See* note 177 *supra.*

had specifically denied it such power. This distinction was not recognized by the New York Legislature and the State continued to extend its laws over New York reservations, in areas not within the scope of *Dibble*, without Congressional consent. Numerous court opinions prior to *Forness* continued to question this exercise of state power.

In *People ex rel Cusick v. Daly*,[197] the New York Court of Appeals considered the question whether an Indian who committed a major crime on the Tuscarora Reservation could be prosecuted in state courts. A federal statute had been enacted in 1885[198] which vested the federal courts with jurisdiction over major crimes committed by Indians on reservations. Prior to this enactment the Supreme Court had held that Indian tribes had jurisdiction over all crimes committed by Indians against Indians on reservations.[199] The lower court in *Daly* had construed the 1885 enactment as conferring jurisdiction on the federal courts for crimes committed on lands set aside by the United States for Indians in the West, and found that state courts had jurisdiction over crimes committed by Indians on Indian lands in the original colonies.[200] The Court of Appeals reversed the lower court and found the 1885 enactment applicable. The court stated that the federal government had never relinquished its suzerainty over tribes in New York regardless of the fact that the State had legislated in Indian affairs from time to time. The court noted that the Supreme Court in its opinion in *The New York Indians* had relied solely on its earlier opinion in *The Kansas Indians*, thereby demonstrating clearly that the Supreme Court saw no difference between the extent of state jurisdiction over the tribes in the West and in the original colonies.[201] Relying on a string of Supreme Court cases such as *Fellows, Worcester, The New York Indians, Kagama*, and *Sandoval*, the highest court of New York stated:

> As bearing upon the question whether the New York Indians are to be regarded as wards of the Nation or of the state, we think there was no less reason for placing them under the protectorate of the Federal government than there was for extending it to the other tribes resident in any of the original thirteen colonies.[202]

The court left open the question of whether New York could impose its laws on the Indians in the absence of federal action.[203]

[197] 212 N.Y. 183, 105 N.E. 1048 (1914).
[198] *See* note 147 *supra*.
[199] *Ex parte* Crow Dog, 109 U.S. 556 (1883).
[200] 78 Misc. 657, 138 N.Y.S. 817 (Sup. Ct. 1912).
[201] 212 N.Y. at 189, 105 N.E. at 1052.
[202] *Id.* at 188; 105 N.E. at 1050.
[203] *See* United States v. Charles, 23 F.Supp. 346 (W.D.N.Y. 1938); Rice v. Maybee, 2 F.Supp. 669 (W.D.N.Y. 1933); Mulkins v. Snow, 232 N.Y. 47, 133 N.E. 123 (1921).

Finally, a categorical statement by the Second Circuit Court of Appeals in 1942 in *United States v. Forness*[204] urged the New York Legislature to seek specific consent to application of its civil and criminal laws to New York Indians. Congress complied and thus mooted to a great extent further claims to state power based on unique status. However, it is clear that not just one decision of a court posed a barrier to the State's claim, as numerous people suggested during the hearings prior to the grant of consent by Congress,[205] but there was a whole course of litigation beginning with *Worcester*, not deviated from in *Dibble*, and concluded in *Forness*.

The Tuscarora litigation apparently brought to an end the assertions of New York that it enjoyed a unique power over Indian lands within that state. Even though the Supreme Court of the United States found adversely to the Tuscaroras, the opinion made clear that the only way the State could avoid violating the Non-Intercourse Act, other than complying specifically with its terms, was if Congress had consented to the state agency taking the land. If consent was given by Congress, the provisions of the Non-Intercourse Act would not be applicable since the Act did not apply to the United States, its agents or licensees. The Court found consent.

Examination of the litigation involving New York's claim to power over Indian lands within that state demonstrates that the question of power over Indian lands, stemming from the status of being an original colony, was not susceptible to easy dismissal. The courts, both federal and state, at times accepted the arguments for a unique state power and at times rejected them. A line of precedent, therefore, developed on both sides of the issue. When a court, either federal or state, saw the havoc which a finding of lack of power in New York over Indian lands might cause for the status of numerous titles throughout the state, it expressed that concern[206] and chose the line of precedent that would support state power. There was little pretense at distinguishing opposing precedents since most courts did not even bother to consider them. This was true to a great extent not only of those judicial opinions which sought to validate state power but also of those which rejected that power. As a result, a body of judicial opinion did not emerge to urge Congress or the Department of Interior to accept and fulfill its guardianship duties to protect New York Indians' lands.

As to state power over Indian affairs, the rule prior to the specific

[204] 125 F.2d 928 (2d Cir. 1942).
[205] *See* note 180 *supra*.
[206] *E.g.* United States v. Franklin County, 50 F.Supp. 152 (N.D.N.Y. 1943); Seneca Nation of Indians v. Christie, 126 N.Y. 122, 27 N.E. 275 (1891), *appeal dismissed*, 162 U.S. 283 (1896).

extension of jurisdiction to the State of New York by Congress[207] seems to have finally emerged in 1942 in *United States v. Forness*, that the states, regardless of whether they were original colonies, could not legislate over Indian reservations or matters involving Indians on the reservations without the consent of Congress. Although that rule was watered down to some extent in recent years by the Supreme Court, essentially the only change is that states can legislate without specific consent of Congress on matters that do not infringe upon the self-governmental rights of a tribe.[208] There are still, therefore, strict limitations on what a state may do to affect Indians residing on reservations within its borders in the absence of congressional consent.

C. *Conclusion*

It is apparent that the State of Maine cannot claim the nonexistence of the Passamaquoddies as a basis for usurping the paramount power of the federal government. Additionally, examination of the litigation involving the State of New York does not support a special source of power for Massachusetts, to which Maine might have succeeded in 1820, over the Passamaquoddy Tribe or Passamaquoddy lands based on the status of having been a former colony.

Consent by the federal government, therefore, must be found for the making of the 1794 treaty by Massachusetts with the Passamaquoddy Tribe. There is no evidence that the treaty of 1794 was made in compliance with the Non-Intercourse Act. Whether consent from the federal government to the 1794 treaty can be founded upon the closing of the federal Eastern Agency in 1783 will be for the courts to decide. Certainly, the closing of the agency is at least equivocal and does not conform to the specificity of consent to state action in Indian matters that has been required by the Supreme Court.[209] It is also critical to emphasize that this action was taken at a time when, as Chief Justice Marshall noted in *Worcester*, the states were claiming powers under the Articles of Confederation which they did not enjoy under the Constitution.[210]

Consent by the federal government to Maine's assumption of power to deal with Passamaquoddy lands, and to extend its laws over the Passamaquoddy Tribe must also be found. It remains to be seen whether the judiciary will consider ratification of the Act of Separation by Congress a sufficient manifestation of consent to Maine's assumption of power. The central objective of this ratification was the creation of a new state.[211] Furthermore, where Congress ratified a compact between

[207] *See* notes 178 & 179 *supra*.
[208] *See* note 177 *supra*.
[209] *See* note 177 *supra*.
[210] *See* note 184 *supra*.
[211] Act of March 3, 1820, Ch. 19, 3 Stat. 544.

Massachusetts and New York,[212] dealing directly with the right of preemption to Indian lands, the Supreme Court in *Fellows*[213] did not consider this action a surrender of federal power to the state.

The Passamaquoddy example is but one indication of a persistent failure on the part of the National government to keep its word to Indian tribes throughout the country. A similar example led the Ninth Circuit Court of Appeals in 1956[214] to vehemently denounce that failure:

> From the very beginnings of this Nation, the chief issue around which federal policy has revolved has been, not how to assimilate the Indian nation whose lands were usurped, but how best to transfer Indian lands and resources to non-Indians.
>
> The numerous sanctimonious expressions to be found in the acts of Congress, the statements of public officials, and the opinions of courts respecting the 'generous and protective spirit which the United States properly feels to its Indian wards' . . . and 'the high standards for fair dealing required of the United States in controlling Indian affairs' . . . are but demonstrations of a gross national hypocrisy.[215]

The burden lies with the States of Massachusetts and Maine to show the basis for their asserted power over Indian lands and Indian tribes in Maine. The reasons why Maine and Massachusetts have enjoyed so much power over the Passamaquoddy Tribe are probably the same as the reasons suggested by the Second Circuit Court of Appeals in *Tuscarora*. The Department of Interior has failed to fulfill the national guardianship duty owed to Maine's tribes. Some of the blame must also lie with the United States Congress which has failed to exercise the power vested in it by the United States Constitution. The failure of the Department of Interior to fulfill its duty and of Congress to exercise its power, however, has created no rights in the State of Maine. The federal government has never surrendered its power over Maine's tribes. That power must be resurrected and the many wrongs must be remedied.

[212] The ratification is discussed in note 143 *supra*.
[213] 60 U.S. (19 How.) 366 (1856).
[214] United States v. Ahtanum Irrigation District, 236 F.2d 321 (9th Cir. 1956), *cert. denied*, 352 U.S. 988 (1957).
[215] *Id.* at 337-38.